

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 16 March 2004

CASE NO.: 2003 AIR 18

In the Matter of

PATRICK L. WEIL
Complainant

v.

PLANET AIRWAYS, INC.
Respondent

Appearances: Mr. Darin DiBello, Attorney
For the Complainant

Ms. Caran Rothchild, Attorney
Ms. Ivonne Barroso, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER –
DISMISSAL OF COMPLAINT**

This case arises under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121 (“AIR 21” or “the Act”), as implemented by 29 C.F.R. Part 1979. This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulations, or standard of the Federal Aviation Administration (“FAA”) or any other provision of Federal law relating to air carrier safety.

PROCEDURAL BACKGROUND

On March 11, 2002, Mr. Weil filed a complaint with the Occupational Safety and Health Administration (“OHSa”), U.S. Department of Labor (“DOL”), alleging that Planet Airways, Inc. (“Planet Airways”) had terminated his employment as the Director of Passenger Services on

February 15, 2002 in retaliation for raising safety and security concerns associated with the company's charter flights (CX K).¹

On January 28, 2003, after an investigation of Mr. Weil's complaint, the Regional Administrator for OSHA notified the parties that he found no violation of the Act's employee protection provisions (CX D, RX 20, and RX 25). Specifically, based on a pre-existing disciplinary record, the Regional Administrator determined Planet Airways had terminated Mr. Weil's employment for legitimate personnel reasons rather than for his safety and security concerns. On February 19, 2003, through counsel, Mr. Weil objected to findings and requested an administrative hearing.

Pursuant to a Notice of Hearing, dated March 13, 2003, I initially set a hearing date of April 16, 2003 (ALJ I). After two continuances (ALJ II and ALJ III), on September 4 and 5, 2003, under the provision of 49 U.S.C. § 42121 (b) (2) (A) and 29 C.F.R. § 1979.107 (b), I conducted a hearing in Fort Lauderdale, Florida with Mr. Weil, Mr. DiBello, Ms. Rothchild, and Ms. Barroso.

Complainant's Statement of the Case²

In the early spring of 2002, after attending a two day seminar, Mr. Weil explained to Planet Airways executive officers, including the CEO, during a conference call, the requirements of the Advanced Passenger Information System ("APIS") being implemented by U.S. Customs. He then laid out his plan to ensure the company's compliance with APIS. The CEO and Director of Sales told him not to worry about the program; they were going to take care of it. As corroborated by multiple witnesses, Mr. Weil expressed his insistence that Planet Airways comply with the APIS. For the next week, Mr. Weil continued to forcibly urge the CEO to comply with APIS and the associated requirements of the Aviation and Transportation Security Act and the Enhanced Boarder Security and Visa Entry Reform Act. He stressed the short time frame available to achieve compliance. However, the company took no action. About ten days after he first insisted that the air carrier comply with APIS, Planet Airways terminated his employment on February 15, 2002. Mr. Weil's stated concerns about APIS involved safety and security issues and were protected activities. Obviously, Planet Airways terminated Mr. Weil "so as to prevent him from reporting to the FAA Planet's non-compliance, and to silence his internal dissent regarding compliance. . ." Directly due to his protected activity, Planet Airways terminated his employment in violation of AIR 21.

Planet Airways has failed to prove by clear and convincing evidence that it would have terminated Mr. Weil on February 15, 2002 in the absence of his protected activity. Instead of clear and convincing evidence, the company has presented a pretext for his termination. Neither witness called by Planet Airways was credible and their vague and unsupported statements fail to meet the requisite evidentiary standard. Their stated reasons for discharge are inconsistent with

¹The following notations appear in this decision to identify specific evidence: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and, TR – Transcript of hearing.

²TR, pages 7 to 10, and closing brief, dated November 14, 2003.

evidence that shows after Mr. Weil's October 2001 suspension his "conduct was exemplary." In an attempt to avoid liability for its actions, Planet Airways used Mr. Weil's disciplinary record from four months earlier to justify his termination. Had that disciplinary record been the real reason for discharge, Mr. Weil would have been terminated in October 2001 and not February 2002.

Due to Planet Airways' violation of the employee protection provisions of AIR 21, Mr. Weil seeks reinstatement in his position as Director of Passenger Services at the annual salary of \$37,500, plus an annual bonus of \$1,800. Mr. Weil is entitled to back pay for the period February 15, 2002 until June 15, 2003, including five weeks of vacation owed at the time of his separation and three additional weeks that would have accrued had he remained an employee. Mr. Weil's personnel file should be purged of all references to his protected activities and termination. He should receive interest of 9% per annum on any award. Mr. Weil also seeks unspecified general compensatory damages for pain and suffering, punitive damages, and attorney's fees and litigation expenses. Finally, Planet Airways should be prohibited from further retaliating against Mr. Weil in violation of the Act.

Respondent's Statement of the Case³

Mr. Weil's case does not involve any whistleblowing activity. Instead, Mr. Weil was terminated as the company's Director of Passenger Services because he was argumentative, combative, rude and abusive to both Planet Airways employees and customers. Mr. Weil had been previously counseled, warned, and suspended by his supervisor for poor performance and attitude. However, after his suspension, Mr. Weil engaged in another employee confrontation in mid-November 2001, was uncooperative with a new employee in the spring of 2002 and threatened to resign and take company property with him. Due to these additional behavioral issues and upon consideration of Mr. Weil's personnel file, the company's human resource manager recommended that Mr. Weil be terminated. The company owners approved the termination recommendation on February 14, 2002 and Mr. Weil was separated the next day. Although Mr. Weil's immediate supervisor, Mr. Barber, has subsequently stated that he really didn't mean what he wrote in Mr. Weil's personnel record, he did not inform the company owners or the human resource manager of the inaccuracies.

Mr. Weil's whistleblower complaint also fails because he did not engage in any activity that is protected under AIR 21. He never raised any safety concerns to either the FAA or his supervisors. Mr. Weil's complaints related to ground handling issues that did not involve any violation of a FAA or federal order, regulation, or standard. Concerning APIS, no violation was involved because Planet Airways never refused to comply with the new passenger reporting requirements. Significantly, in his AIR 21 complainant, Mr. Weil did not allege that his APIS advocacy was the basis for his termination. Even if Mr. Weil's APIS advocacy were determined to be a protected activity, his complaint still fails because his termination was a legitimate personnel action based on a lengthy record of behavior problems, completely unconnected with APIS. Mr. Weil's advocacy of APIS was never mentioned in the termination discussions and played no role in the personnel action.

³TR, pages 11 to 15, and closing brief, dated November 14, 2003.

Finally, Mr. Weil's whistleblower complaint must be dismissed since Planet Airways has established by clear and convincing evidence that his termination was based on non-retaliatory considerations, including his uncooperative, argumentative, and abusive attitude towards customers and employees. Such behavior, insubordination and violations of company policies would support any employer's decision to terminate employment. Other than accusations, Mr. Weil failed to present any evidence to demonstrate that Planet Airways' stated reasons for discharge were pretextual.

ISSUES

1. Whether Mr. Weil engaged in a protected activity under the Act.
2. If Mr. Weil engaged in a protected activity, whether that protected activity was a contributing factor in the Planet Airways' decision to terminate his employment on February 15, 2002.
3. If Mr. Weil's protected activity was a contributing factor in the decision to terminate his employment, whether Planet Airways has established by clear and convincing evidence that it would have terminated Mr. Weil's employment on February 15, 2002 in the absence of the protected activity.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Evidentiary Discussion

At the hearing, the following documents were admitted into evidence: CX A to CX F, CX I, CX K, CX M to CX V,⁴ RX 1 to RX 44, and RX 47 to RX 72.⁵ However, during my preparation of this decision, I discovered several exhibits that contained personnel documentation of individuals who did not have an apparent relationship to this case as presented to me. Accordingly, I have struck RX 59 to RX 61 (Mr. Roy Sykes), RX 62 (Ms. Zandra Simm), RX 64 (Mr. Luis Michaels), and portions of RX 67 (Mr. David Leonti and Mr. Martin Reid) from the record. On March 4, 2004, I sealed these exhibits. The sealed exhibits will continue to accompany the record of this proceeding.

Mr. DiBello, counsel for Mr. Weil, objected to RX 29, a safety consultant's evaluation of a March 2002 FAA CSET draft inspection report of Planet Airways, on relevancy grounds. Ms. Rothchild, Respondent's counsel, offered the exhibit on the basis of Mr. DiBello's pre-hearing report which indicated the subject might be presented as an issue. I deferred a decision on the admission of RX 29 (TR, page 30). At this time, since the issue did not arise, I sustain the relevancy objection. RX 29 is marked "offered, not admitted."

⁴CX V was provided as a reference only. CX V is the Planet Airways' general operations manual extract which is in the record as RX 2.

⁵CX G, H, J, and L, offered but not admitted. RX 45 and 46, offered but not admitted.

In light of the above actions, my decision in this case is based on the sworn testimony presented at the hearing and the following documents that remain in evidence: CX A to CX F, CX I, CX K, CX M to CX V, RX 1 to RX 28, RX 30 to RX 44, RX 47 to RX 58, RX 63, RX 65, RX 66, RX 67 (Ms. Maricarmen Scott and Mr. James Thompson), and RX 68 to RX 72. Although I have summarized below only the relevant evidence, I have reviewed and considered all the record evidence.

Complainant's Evidence

Sworn Testimony of Mr. James Thompson (TR, pages 31 to 62)

[Direct examination] Mr. Thompson was the Security Coordinator for Planet Airways from March 2000 to April 2003. The company indicated that it terminated his employment in April 2003 as part of cost cuts. In the beginning, when the company was smaller, he worked very closely with Mr. Weil.

At meetings with U.S. Customs on February 4 and 5, 2002, Mr. Thompson was informed that APIS was being instituted as an anti-terror measure to monitor individuals entering and leaving the United States. He attended the meeting with Mr. Weil. According to the presentation, the company only had about two weeks to comply with the program. He believes the exact compliance date was February 18, 2002. Under the mandated procedures, passenger identification information and the manifest had to be electronically transmitted to U.S. Customs. After about 11 failures to comply, they were told fines up to \$5,000 would be imposed.

Upon returning to Planet Airways in Fort Lauderdale, Mr. Weil and Mr. Thompson discussed the program with Mr. Bainton, the Director of Safety, and Mr. Barber, the Director of Operations. In response, about two days later, Mr. Barber set up a conference call with Mr. Garrambone, CEO, and Mr. Hackert, who was the vice president of sales. Both Mr. Garrambone and Mr. Hackert were located in Orlando, Florida, administrative offices. Planet Airways conducted its operations out of Fort Lauderdale. The other participants in the conference call were Mr. Barber, Mr. Weil, Mr. Bainton, and Mr. Thompson. In their conversation, Mr. Weil explained the urgency of implementing the program. He stated the required compliance date and consequences for non-compliance. Mr. Garrambone and Mr. Hackert stated they would take care of the program. They did not indicate how they would do it. In response, Mr. Weil stated they didn't understand the urgency of the situation since they didn't attend the U.S. Customs' meetings. He did not believe the Orlando office could take it on. Mr. Garrambone repeated they would handle it in Orlando. Mr. Weil continued to insist that the Fort Lauderdale operations office should implement the program. He set out the testing procedures that needed to be accomplished prior to transmitting the manifests. Mr. Weil pointed out that both software and training were needed. He appeared "extremely frustrated." After Mr. Garrambone and Mr. Hackert again stated they would handle it, the conversation was over.

Within the following week, Mr. Thompson believes the Orlando office started electronically transmitting the passenger manifests. He is not aware of whether the company purchased software or conducted any tests.

Both Mr. Barber and Mr. Weil were terminated on the same day. After their termination, Mr. Thompson had a conversation with Ms. Morton, a passenger service clerk in Orlando, about the company's efforts to comply with APIS. She indicated no testing was accomplished prior to starting the manifest transmissions. As Mr. Thompson understood the program, that was not the proper procedure.

[Cross examination] Mr. Thompson was not aware of whether APIS was to be introduced in phases. Since APIS was not going into effect until February 18th, the company would not have violated it on February 15th.

Mr. Thompson acknowledged that the Orlando office may have taken actions to comply with APIS and he was not aware of those actions. He is unaware of Ms. Morton's involvement with APIS compliance prior to February 15, 2002.

[ALJ examination] According to U.S. Customs, APIS was being introduced for safety and security reasons in light of terrorism activities in 2001.

Planet Airways operates out of the Fort Lauderdale airport and flies to Mexico, the Bahamas and other Caribbean locations.

Sworn Testimony of Mr. Michael Bainton
(TR, pages 62 to 96)

Mr. Bainton was the Director of Safety for Planet Airways until April 15, 2002, when he was terminated. The Director of Safety is an FAA regulated position; other regulated positions include Director of Operations, Chief Pilot and Director of Maintenance. The FAA regulations set out the qualifications for these positions. As the Director of Safety, Mr. Bainton reported directly to the CEO of Planet Airways.

Mr. Bainton knew Mr. Weil, who was the Director of Passenger Relations and reported to the Director of Operations. Mr. Bainton is also familiar with APIS. APIS was designed after September 11th to obtain and monitor information about people entering the United States. In the beginning of December 2001, Planet Airways received notice from U.S. Customs that APIS was to be in place within 90 days. When Mr. Bainton was notified about a U.S. Customs seminar on APIS, he sent Mr. Weil and Mr. Thompson in the early part of February 2002. As the passenger coordinator, Mr. Weil would have direct access to customer information; Mr. Thompson's responsibility would be to compile the information in the requisite format. After the seminar, Mr. Weil and Mr. Thompson briefed Mr. Bainton on the required format and the time frame for submission of passenger lists. They also obtained information about a computer program used by some airlines that already met the requirements. According to Mr. Bainton, Planet Airways had about 12 days to be in compliance with the reporting requirement. He discussed the situation with Mr. Barber and they agreed the computer program was the "most expedient way" to meet the compliance deadline.

About an hour after Mr. Weil and Mr. Thompson returned from the seminar, in a conference call with Mr. Garrambone and Mr. Hackert in Orlando, they passed on their

recommendation on the computer program. In that call, Mr. Weil explained the short deadline and the corresponding fines for late compliance. He also told them about the computer program and its \$10,000 price tag and suggested that another person would have to be hired to run the program. Mr. Garrambone indicated his reluctance and Mr. Hackert responded that he would not take that approach; he didn't want to bother the customers. Mr. Weil was "very vehement" in his response that they must comply if they wanted to keep flying. He kept insisting their approach threatened the existence of Planet Airways. The tone was confrontational. At the conclusion of the call, Mr. Garrambone promised that a technician and a computer programmer would arrive in Fort Lauderdale the next morning for the purpose of developing Planet Airways' own APIS system.

No one from Orlando arrived the next day. When Mr. Weil called Orlando, he was told the individuals were on the way. As the day proceeded, Mr. Weil became "very frustrated." Mr. Bainton felt intimidated by the compliance issue because the penalty for noncompliance was \$5,000 per passenger and Planet Airways would carry hundreds of passengers during the upcoming spring break.

When Mr. Bainton arrived at work on February 15th, Mr. Barber had already been terminated. Later in the day, Mr. Weil was also gone. After Mr. Weil's departure, no programmer or technician came to Fort Lauderdale. Mr. Bainton was terminated in April 2002. At that time, Planet Airways was still not in compliance with APIS. Since APIS compliance involved aviation, as the Director of Safety, Mr. Bainton was responsible for the program. It was not appropriate for the CEO to assume that responsibility.

[Cross examination] Mr. Bainton became the Director of Safety in January 2001. On one occasion, Mr. Bainton received a request from an FAA inspector about his ability to accomplish his duties and responsibilities. Mr. Bainton was in contact with other airlines about APIS and he informed Mr. Garrambone about his discussions. According to the FAA, Mr. Garrambone could not conduct any of the company's operations.

Mr. Bainton acknowledged that the Aviation and Transportation Security Act did not state that only the Director of Safety could perform duties related to APIS. Likewise, neither FAA regulations nor any federal law contained such a limitation.

Mr. Garrambone is the decision maker in terms of the "airline's direction;" however, he can not direct operations. While Mr. Garrambone does take recommendations and makes ultimate decisions, if compliance were at issue, Mr. Bainton would not go along with a decision that was against the regulations.

Mr. Bainton's recommendation about the computer software didn't have to be accepted. Mr. Garrambone could make a different decision on how Planet Airways would achieve compliance.

Mr. Bainton was aware of the company's non-compliance because after February 15th, in the absence of Mr. Barber, he was assigned, with FAA approval, as the operations officer. In that position, Mr. Bainton was involved in every flight and he "was aware they were not in

compliance.” Compliance wasn’t required until February 18th, which involved the first phase consisting of 30 days to sort out “the bugs in the system.” After that trial period, the compliance fines would be implemented. There were four phases and according to Mr. Bainton, Planet Airways was in non-compliance only during the first phase.

Mr. Bainton was told by Mr. DeCamillis that Mr. Weil was terminated for the good of the company.

[ALJ examination] In the telephone conference call about APIS, Mr. Bainton objected to the company’s plan to use a programmer and technician because the pre-existing software program was the most expedient way to comply with APIS requirements. Mr. Bainton is only aware of the compliance efforts made in Fort Lauderdale; he is not aware of the actions company representatives in Orlando may have taken.

On the occasions when Mr. Bainton was aware the company was not complying with APIS, he informed the new Director of Operations. He made that determination because the company was not sending the passenger information in a timely manner. He was aware U.S. Customs had called some time after the first phase about not receiving the information. The new Director of Operations indicated that the company would improve and “get there.”

Sworn Testimony of Mr. Frank Barber
(TR, pages 98 to 174)

[Direct examination] From May 1999 through February 15, 2002, Mr. Barber was a vice president and the Director of Operations at Planet Airways. He was Mr. Weil’s direct supervisor. As Director of Passenger Services, Mr. Weil was responsible for coordination of all ground operations, including security. Mr. Weil also handled customer complaints. Mr. Barber was not involved in Mr. Weil’s termination. He was not consulted about the termination and was unaware of the termination decision.

Mr. Barber is familiar with APIS, which is designed to provide timely passenger information to U.S. Customs prior to flight arrival. Mr. Weil was one of the individuals chosen to attend a two day briefing on APIS. After the briefing, both Mr. Weil and Mr. Thompson were alarmed by the program’s requirements. They felt Planet Airways was unprepared. Right after their conversation, Mr. Barber arranged a telephone conference call with Mr. Garrambone and Mr. Hackert, who is the vice president of sales, an unregulated FAA position. In the telephone discussion, Mr. Weil explained the APIS requirements and its urgency. Mr. Hackert disagreed the situation was an emergency. Mr. Garrambone seem to listen to Mr. Hackert. Due to the nature of APIS, Mr. Barber explained that the office in Fort Lauderdale needed an expert to help with the formatting of the reports. He insisted someone come to Fort Lauderdale the next day. The following week, no one arrived. The APIS report needed to be in a specific format but the company didn’t address that issue. When he was terminated February 15th, he believed nothing had been done. The APIS deadline was about February 19th.

During this period of inaction, Mr. Weil was on the phone several times every day “pressing the issue.” On occasions, he overheard him talking to Mr. Garrambone. During this same time frame, Mr. Barber did not receive any complaints about Mr. Weil’s job performance.

Mr. Barber hired Mr. Weil and started him at about \$30,000 a year. By February 2002, his salary was about \$37,500. Mr. Weil also received a bonus in 2001.

[Cross examination] Mr. Barber had a few conversations with Mr. Garrambone about Mr. Weil. He never expressed any intention to get rid of Mr. Weil due to his safety complaints. Mr. Weil had raised issues with Mr. Barber about safety in regards to contracts where Planet Airways only provided the aircraft, crew, maintenance and insurance (“ACMI”). The customer provided everything else. Mr. Weil was concerned that some customers were not meeting their requirements with due diligence. He believed Planet Airways would become responsible for their mistakes. Mr. Weil “complained quite a bit” about some of the trips that had been set up by Mr. Hackert. Most of the complaints were security issues. The ACMI arrangements had to comply with FAA regulations.

It’s possible that someone in Orlando was working on APIS compliance. As of the date of his termination, Planet Airways had not violated APIS.

[ALJ examination] From their tone during the telephone conference call, Mr. Garrambone and Mr. Hackert did not share the sense of urgency held by Mr. Barber and Mr. Weil.

Mr. Barber hired Mr. Weil about mid-2000. Mr. Barber supervised about 100 people. He fired a few people, sometimes without Mr. Garrambone’s approval. Other than Mr. Weil, and one instance involving two pilots, Mr. Garrambone did not fire any of Mr. Barber’s employees. Mr. Barber had informed Mr. Garrambone about the pilots’ activities. There was no formal appraisal system in place. Mr. Garrambone established who will receive a bonus.

Mr. Barber did have some performance issues with Mr. Weil. In particular, he was concerned about Mr. Weil’s relationship with Mr. Hackert. They were in conflict from the very beginning when Mr. Hackert arrived in July 2001. Essentially, Mr. Hackert seemed to disregard the operational constraints of the company and its ability to deliver as promised. According to Mr. Barber, Mr. Hackert’s bonus was based on the number of hours flown by the company. The conflict developed because Mr. Weil would see the problems associated with the trips Mr. Hackert arranged. So, he challenged Mr. Hackert.

Mr. Barber observed some of the exchanges between Mr. Weil and Mr. Hackert. He was asked by Mr. Garrambone and Mr. Hackert to document these incidents. He believed most of the issues raised by Mr. Hackert about Mr. Weil were “unfair,” and he never brought those issues to Mr. Weil’s attention. Mr. Barber felt Mr. Hackert had too much influence over Mr. Garrambone. Mr. Hackert, as vice president of sales, was located in Orlando and had direct access to Mr. Garrambone. Mr. Barber believed Mr. Weil was “one of the most productive employees.” However, Mr. Garrambone believed Mr. Weil was just being argumentative and he wanted Mr. Barber to document that behavior. In response, Mr. Barber gave Mr. Weil a “verbal

warning document on several occasions.” He kept the warning letters in Mr. Weil’s file. Mr. Barber told Mr. Garrambone that he disagreed with the warnings. But he was overruled by Mr. Garrambone and so documented the conflicts as directed.

Mr. Barber counseled Mr. Weil not to react to Mr. Hackert’s provocations. Mr. Weil has a temper. When Mr. Hackert attacked, he attacked back. He displayed his temper by yelling and arguing over the phone in the Fort Lauderdale business office. In response to Mr. Barber’s advice, Mr. Weil said he would try. Additionally, Mr. Barber told Mr. Hackert to speak directly to him and not Mr. Weil.

At one time, Mr. Hackert attempted to have Mr. Weil moved under his supervision, but Mr. Barber objected because he wanted some checks and balances between sales and operations.

[Re-direct examination] The last documented incident between Mr. Hackert and Mr. Weil occurred in October or November of 2001.

[Re-cross examination] Mr. Barber recognized his signature on RX 6 to RX 10. RX 6 is a verbal warning, but Mr. Barber didn’t pass the document on to Mr. Weil. However, he did speak to Mr. Weil about curbing his behavior in regard to Mr. Hackert. Mr. Barber did hear the exchange that formed the basis for RX 6. Both Mr. Weil and Mr. Hackert were being rude and obnoxious.

Some of Mr. Weil’s rude responses related to customers too. Mr. Barber heard Mr. Weil talk to customers over the phone in a rude and obnoxious tone. Mr. Barber explained:

Mr. Weil was the point person in the office to receive all complaints. Many of the complaints had to do with promises that were made by the sales department to customers. When Mr. Weil was not given any resources by Mr. Garrambone to resolve a lot of these complaints, people on the other end of the phone got rude and so Mr. Weil would react in a very firm way himself. Then, they would call Orlando. They would call Mr. Hackert and of course, he would go to Mr. Garrambone and say, ‘He’s being rude to customers.’ But a lot of this came out of the problems he was having with the way Mr. Hackert was conducting his job.

RX 7 describes Mr. Weil interfering with crew scheduling. Mr. Barber advised him to quit acting “exasperated and disgusted” every time a scheduling change occurred. Such changes were business, not personal. Although Mr. Weil wasn’t really interfering, he wrote that down as instructed because Mr. Garrambone had received a complaint about his interference from Mr. Hackert. After he got Mr. Weil’s side of the story, he believed the warning was “unfair.” Mr. Barber wasn’t present during this incident. He does know that Mr. Hackert called crew scheduling which “he had no real right to do.”

RX 8 is a verbal warning signed October 11, 2001. Mr. Barber received complaints from Mr. Hackert about Mr. Weil’s way of dealing with customers. Mr. Barber counseled Mr. Weil to try to be helpful to customers rather than “road block” them. Mr. Weil explained that when the customer couldn’t get what he wanted, the customer flew into a rage; Mr. Weil reacted; and, the

customer called Mr. Hackert. Mr. Barber's warning was forceful; he told Mr. Weil this type of reaction "should cease." Additionally, he advised Mr. Weil that before he reached a point where he couldn't deal with a customer, he should transfer the customer to Mr. Barber. Mr. Weil had a short temper and his reactions to irate customers were not acceptable.

RX 9 addresses an October 13, 2001 complaint from an aircrew about Mr. Weil making a personal visit while on a Planet Airways trip. Mr. Barber investigated the situation and discovered the aircrew did not have all the correct facts. Nevertheless, he believed Mr. Weil had made an error judgment. Later, when the customer filled in the details of the incident, Mr. Barber concluded the warning was not warranted. He thought he had withdrawn the warning letter. He kept the warning letters in a loose leaf binder in his office desk. After his termination, Mr. Barber doesn't know what happened to the binder.

In RX 9, Mr. Barber did mention that when Mr. Weil goes on trips he generates complaints. So, he told Mr. Weil to stop taking personal trips with Planet Airways. These situations occurred a couple of times because Mr. Weil "tends to want to run the cabin" which bothers the aircrews and they complain. Neither Mr. Garrambone nor Mr. Hackert were involved in the RX 9 complaints.

On October 18, 2001, Mr. Weil signed a verbal warning, RX 10. The day before, when Mr. Hackert called to make a customer-requested change, Mr. Weil became argumentative. Mr. Hackert wanted Mr. Weil to make a phone call to obtain permission to fly a charter flight into Chicago O'Hare. Mr. Weil knew he'd be denied permission. Mr. Hackert insisted that the call be made. Mr. Weil challenged the decision; he couldn't accept it which caused a major disruption. According to Mr. Barber, "He just won't stop arguing and simply do his job." He told Mr. Weil that next time he should just make the phone call and stop arguing with Mr. Hackert.

Even though he disagreed with their content, Mr. Barber signed most of these warnings because he believed Mr. Weil couldn't be fired without his permission. Mr. Barber planned to protect Mr. Weil by retaining control over the situation.

About the third week of October 2001, Mr. Garrambone and Mr. Hackert wanted to fire Mr. Weil. Mr. Barber was able to save Mr. Weil's job by negotiating the contents of a letter to Mr. Weil, RX 11, which gave Mr. Weil one last chance. Mr. Weil was a valuable employee and Mr. Barber needed him. He could do the work of five people. But "Mr. Hackert didn't want to hear that and Mr. Garrambone was listening to him." On about October 18, 2001, Mr. Barber presented the letter to Mr. Weil. Mr. Weil challenged the whole letter and the assertion about on-going deficiencies. Mr. Barber told him the document was negotiated. He either accepted it or would be fired. Mr. Barber did believe Mr. Weil had been argumentative with customers. In the letter, Mr. Barber warned Mr. Weil that any further incidents would result in immediate termination.

Sometime before Christmas 2001, Mr. Weil had an altercation with another employee who tried to obtain free passes from one of Mr. Weil's personal contacts. The contact called Mr. Weil about the request and he then confronted the other employee. They had a loud argument.

The employee, a vice president of maintenance, did not believe he had to work through Mr. Weil to get free passes. Mr. Barber stopped the altercation. He advised Mr. Weil that his behavior was unacceptable.

Mr. Rodriquez started working for Planet Airways around Halloween 2001. He was involved in human resources and Mr. Barber's responsibilities in that area changed after his arrival. It's possible Mr. Rodriquez may have received other complaints about Mr. Weil. From the October 18, 2001 letter to mid-February 2002, Mr. Barber did not receive any other complaints about Mr. Weil. Mr. Rodriquez reported to Mr. Garrambone.

[Re-direct examination] The incident with the other employee about free passes occurred in November 2001; it may have also involved the other employee using Mr. Weil's signature. After Mr. Weil's one week suspension, "things got calm."

[Re-cross examination] Mr. Barber had some involvement with Mr. Rodriquez. At the same time, there was an on-going investigation about a whistleblower complaint against him.

When another person was hired to work international passenger service, Mr. Weil and the new employee made complaints about each other.

Sworn Testimony of Mr. Patrick L. Weil
(TR, pages 176 to 249)

Mr. Weil started in the airline industry as a baggage handler for Continental Airlines in 1978. As he developed airline experience over the next 25 years, Mr. Weil worked numerous positions in operations and became a manager for Hawaiian Airlines. In 2000, he joined Planet Airways as a flight operations coordinator. After six months, he became the Director of Passenger Services. In that capacity, Mr. Weil oversaw all passenger activities which included ground handling, security, check-in, airport facilities, catering, and flight filing. His immediate supervisor was Mr. Frank Barber. At the time of his February 15, 2002 termination, Mr. Weil was a salaried employee earning \$37,500 a year. In 2001, he received two pay raises and a Christmas bonus, which was an additional two week salary.

On February 15, 2002, when he walked into the Operations office, Mr. Weil noticed tears, sadness, and confusion among the general employees. They said Mr. Barber had just been escorted out of the office. When he sat down at his desk, he noticed files were missing. Mr. Garrambone came into his office and escorted him to Mr. Barber's former office. At that time, he was informed that he was terminated. When he asked for a reason, Mr. Garrambone said, "No reason at all." Then, a sheriff deputy escorted him out of the building after giving him five minutes to collect his personal effects.

Immediately prior to his termination, Mr. Weil had been involved in discussions with Mr. Garrambone concerning the implementation of APIS, the congressionally-mandated passenger information system.

Earlier, Mr. Bainton sent Mr. Weil and Mr. Thompson to a seminar conducted by U.S. Customs concerning APIS. He was informed that all air carriers, including charter airlines, would be required to comply with the APIS requirements within two weeks. Some larger airlines had been testing the program but Planet Airways had not. As one approach to achieve compliance, U.S. Customs indicated an off-the-shelf computer program was available. The site license for the program cost \$10,000.

On the day Mr. Weil and Mr. Thompson reported back to Mr. Bainton and Mr. Barber and told them about the substantial fines for non-compliance, a conference call with Mr. Garrambone and Mr. Hackert was initiated. During the conversation, Mr. Weil took the lead in explaining the APIS program, implementation and compliance fines. He then indicated that the first means available to comply was the software program. Mr. Garrambone indicated he didn't want to spend that much money and intended to find another solution. Mr. Hackert stated they wouldn't take the off-the-shelf software approach. Mr. Weil responded that Planet Airways had no choice, it had to comply with APIS and the company needed to respond immediately. Towards the end of the discussion, the possibility of having an in-house programmer look at the formats was raised. Mr. Garrambone promised someone would come to Fort Lauderdale the following day to start building an APIS system. Mr. Garrambone and Mr. Hackert then terminated the call.

The next day, when no one showed up, Mr. Weil called Mr. Garrambone who said the person would arrive the following week. Mr. Weil replied that would be too late. Mr. Garrambone then terminated the call.

The following week, no programmer showed up. So, Mr. Weil made two more phone calls to Mr. Garrambone stressing the need for prompt action. Mr. Garrambone said the company would take care of it. As far as Mr. Weil was concerned, there was no grace period for implementation. From that point on, Mr. Weil was unable to contact either Mr. Garrambone or Mr. Hackert. Mr. Weil had to be forceful in his discussions because Mr. Garrambone tended "to not want to spend money."

Mr. Weil's relationship with Mr. Hackert was adversarial from the time Mr. Hackert arrived in the summer of 2001. According to Mr. Weil, "The first words were yelling and screaming." He never got into a fist fight.

Mr. Weil was suspended one week in October 2001. A charter customer insisted on arriving at Chicago O'Hare. At that time, charter flights without full security were banned at the airport. Mr. Weil notified the customer that arriving at Chicago O'Hare was not authorized since the flight was departing from a location without full security. He convinced the customer to arrive at Midway Field instead. About an hour later, Mr. Hackert called. He was "irate" because Mr. Weil had stated the flight couldn't go into O'Hare Field. Mr. Hackert directed Mr. Weil to send the flight to O'Hare. Mr. Weil tried to explain the situation. They went round and round and the conversation became heated. After the call, Mr. Weil was able to arrange having the charter flight off-loaded at a remote location on O'Hare. However, the plane had to be ferried over to Midway for departure which cost \$3,000. Mr. Hackert blamed Mr. Weil for the additional cost.

Mr. Barber suspended Mr. Weil for one week around October 18, 2001. He said Mr. Garrambone and Mr. Hackert were forcing him to take the action. He was given the option of either terminating or suspending Mr. Weil. During that week, Mr. Weil thought about the situation and decided he would let Mr. Barber handle the problem with Mr. Hackert. After his return, he did not have any more incidents with Mr. Hackert.

Mr. Weil describes himself as an "average guy" who works very hard and explains himself forcefully. On one day, Mr. Weil discovered another employee had requested a free airline pass from one of his contacts using Mr. Weil's name. The contact called him and indicated he would not give the free pass to the other employee. Mr. Weil then confronted the other employee who indicated he made the request because he knew Mr. Weil wouldn't help him. Additionally, the employee wanted to make the arrangements directly. The employee had taken Mr. Weil's card file to make the contact. Mr. Weil yelled at him. The other employee yelled back and got out of his seat and came towards Mr. Weil. The other employee tried to start a fight when Mr. Barber came in and told them to calm down. Mr. Rodriguez was also present and told Mr. Weil to calm down. Mr. Weil left and Mr. Barber talked to the other employee.

Other than the above described incident, Mr. Weil can recall no other heated conversations at work that led to complaints in December 2001 and January 2002. No one talked to him in February prior to his termination about improper actions.

Since his termination, despite his efforts, Mr. Weil has been unable to find any work. Most of his re-employment efforts have been through the internet. He has had several interviews with major airlines.

[Cross-examination] In his exchange with the other employee about the free pass, he used profanity.

Beside his dispute with the other employee about the free pass, he also had some difficulty with another individual who arrived about December 2001. Initially, he did not cooperate with this person. Eventually, Mr. Barber explained that he had to work with her.

Concerning the trip to Chicago O'Hare, Mr. Hackert's argument was that Mr. Weil should at least call the airport in order the he might be able to explain the situation to the customer. Mr. Weil eventually made the call.

The animosity between Mr. Hackert and Mr. Weil had nothing to do with any reports by Mr. Weil about aviation safety.

Mr. Weil waited until the U.S. Customs seminar to inform the company of the APIS requirements because they didn't exist prior to the seminar. Before the seminar, Mr. Bainton was aware of APIS.

Since APIS wasn't effective at the time of his termination, Mr. Weil did not file a complaint alleging a violation of APIS before his discharge.

The landing restriction at O'Hare Field was imposed by the city airport authority and he doesn't know if the FAA was also involved. But, he doesn't think it was an FAA or Federal Government restriction. Afterwards, he received a letter from the airport authority that was a "tongue-lashing." The airport didn't want to be used for charter flights.

Mr. Weil has collected unemployment payments. He submitted an appeal, RX 28, for an extension of benefits. He indicated that the reason he believed he was terminated was because after September 11, 2001, Planet Airways decided to consolidate its offices. He asked for an extension because he had been laid off due to the September 11th terrorist attacks.

Mr. Weil believes he was terminated due to both his complaints about APIS and the cut back in staff associated with the business down turn after September 11th. Quite a few people have been laid off at Planet Airways. In his March 28, 2002 letter to the U.S. Department of Labor, RX 42, Mr. Weil claimed he was terminated due to Mr. Hackert's personal ambitions. While he didn't specify anything about APIS in that letter, he mentioned Mr. Hackert's ambitions which were related to APIS. In his first complaint to DOL, dated March 11, 2002, RX 11, Mr. Weil did cite his APIS complaints.

When Mr. Weil made a phone call to Orlando on February 14, 2002, he was told not to worry about APIS. Mr. Weil states that sometime after the telephone conference and his multiple calls to Mr. Garrambone, Mr. Garrambone stated he was not going to comply.

The OSHA investigator sent an e-mail to Mr. Weil in October 2002 (RX 44). He asked Mr. Weil for FAA regulation citations which indicate that allowing charter customers to make ground arrangements was not permitted. Though Mr. Weil responded (CX J), he is "not an encyclopedia with FAR's and security directives."

Mr. Weil's claimed protected activity involves his pleas to Planet Airways to comply with APIS.

[ALJ examination] When he was terminated, Mr. Weil received nothing in writing. He was surprised and shocked by the action because he had developed his entire department and the progressive airline was doing fairly well.

When he attended the seminar, Mr. Weil was not briefed about the full phased-in approach to APIS. He believed they had to be fully compliant in February 2002. He understood there was a 60 to 90 day testing period concerning accuracy. The fines kicked in after that testing period.

In addition to the internet, Mr. Weil has made some direct contacts looking for work. He has remained focused on work in the airline industry because that's all he really has ever wanted to do.

[Re-direct examination] Mr. Weil had some difficulty with the new employee working international passenger service because she had held herself out to other contacts as the Director of Passenger Services. Mr. Barber didn't know who she was so he called Mr. Garrambone who

stated she was a contractor doing a cost analysis on ground handling operations. Then, she arrived in Fort Lauderdale with Mr. Hackert as the Director of International Passenger Services. Mr. Hackert told him to work with the new employee, but Mr. Weil didn't believe Mr. Hackert had the authority to make that arrangement. He believed she had no business looking in his files. He refused Mr. Hackert's request to turn the files over to her. He also probably had a heated discussion with her about access to his files. After talking to Mr. Barber, she went back to Orlando and Mr. Weil didn't see her again.

[Re-cross examination] Although the files were not his personal property, they were in his area of oversight. He refused to hand them over to her unless ordered to do so by Mr. Barber or Mr. Garrambone.

Mr. Weil is seeking reinstatement.

Aviation and Transportation Security Act
(CX A)

Section 101 (a) of Public Law 107-71, dated November 19, 2001, establishing the Transportation Security Administration provides at 49 U.S.C. § 114 (h) (4), that the appropriate undersecretary may consider requiring passenger air carriers to share passenger lists with Federal agencies for the purpose of identifying individuals who may pose a threat to aviation safety or national security.

Concerning passenger manifests, Section 115 requires 60 days after enactment of the statute that air carriers operating a flight from a foreign country to the United States provide passenger and crew manifests to U.S. Customs by electronic transmission in advance of the aircraft landing in the United States. The air carriers may use the advanced passenger information system.

Enhanced Border Security and Visa Entry Reform Act of 2002
(CX B)

House Bill 3523, dated January 23, 2002, Section 402 requires an authorized agent of an air carrier to provide departure and arrival manifests to U.S. Border officers.

Interim Regulations, 29 C.F.R. §§ 122 and 178
(CX C)

Effective December 31, 2001, Section 122.49 (a) of the interim regulations requires an air carrier to electronically transmit to U.S. Customs passenger information prior to an aircraft's departure from a foreign airfield. The transmission must occur through an electronic data sending system approved by U.S. Customs.

Mr. Patrick Weil's Written Statement
(RX 42)

In a March 28, 2002 letter, after highlighting difficulties Planet Airways was experiencing in passenger services since his termination, Mr. Weil alleges that his termination was due to Mr. Hackert's ambitions. Mr. Weil believes Mr. Hackert had been attempting to move the passenger services function to Orlando since November 2001. However, Mr. Barber remained adamant that passenger services should remain under his control in Fort Lauderdale, considering the safety and security aspects of the work.

Mr. Patrick Weil's Written Statement
(CX F and RX 43)

In a written statement, signed July 30, 2002, Mr. Weil responded to some of the specific incidents presented by Planet Airways to support the termination of his employment. According to Mr. Weil, the two ground handling incidents occurred in Puerto Rico and California because Mr. Hackert permitted customers to make their own ground handling arrangements.

Mr. Weil stated, "During my employment, I never received a copy of any verbal warning." Some customers did complain but those complaints occurred, such as in the Chicago O'Hare incident, because he had to change the customers' airport destinations.

He refuted the allegation about his conduct on November 15, 2001, stating the other individual was the aggressor.

Concerning the company contracts, Mr. Weil states he was never asked to provide those contracts. Mr. Weil also believes he provided timely notice of the APIS requirements. Until directed by Mr. Barber, Mr. Weil refused to cooperate with another person who was presented as a consultant but actually had been designated his replacement. Since that person was not an employee at the time, Mr. Weil believed she was not authorized to receive the requested proprietary information.

Finally, due to Mr. Hackert's harassment and interference, Mr. Weil threatened to resign; however, he did not make any threat to take company property.

Mr. Patrick Weil's AIR 21 Complaint
(CX K, CX S, RX 20, and RX 22)

In a March 11, 2002 letter, Mr. Weil asserts that Planet Airways terminated his employment due to protected activities in violation of AIR 21. Mr. Weil claimed that the Vice President for Sales had required him on multiple occasions to bypass FAA regulations concerning passenger screening. Mr. Weil consistently objected to the Vice President of Sales' decision to permit non-airline companies to make their own ground handling arrangements. This practice raised public safety concerns. On another occasion, he was forced to make flight arrangements into a facility that would not accept the flight. In the first part of February 2002, Mr. Weil brought to the attention of senior management the new requirements for APIS and the

associated penalties for non-compliance. A short time later, on February 15, 2002, he was terminated.

State Unemployment Compensation Form
(CX N, RX 17, and RX 20)

On March 7, 2002, Mr. Carell Rodriquez completed the employer's portion of a state unemployment compensation form indicating Mr. Weil had been terminated due to misconduct. Mr. Rodriquez stated Mr. Weil had threatened to resign and take company property. He also listed several dates of previous disciplinary action.

Personnel Action Notices
(CX R, RX 20, and RX 23)

On August 23, 2000, Mr. Barber approved a salary increase for Mr. Weil from \$30,000 a year to \$35,000. On April 1, 2001, his annual salary was further increased to \$37,500. Between October 21 through October 25, 2001, Mr. Weil was removed from the payroll.

FAA Letter
(CX T and RX 18)

In a December 19, 2001 letter, the FAA chronicled Planet Airways' failure to properly screen passengers boarding a flight to the United States.

Appreciation Letter
(RX 20)

In December 2000, the Director of Operations for Air Partner, Inc. sent Mr. Garrambone an appreciation letter for the work Mr. Thompson and Mr. Weil had performed. The company had received numerous passenger complements concerning their efforts. The Director of Operations highlighted Mr. Weil's "superb" work in sorting out catering and cleaning issues and his efforts in bringing another carrier's performance up to standards.

Letter of Recommendation
(RX 41)

On February 14, 2002, Mr. Frank Barber, as Director of Operations for Planet Airways, signed a letter of recommendation for Mr. Weil.⁶ In Mr. Barber's estimation, Mr. Weil was a highly reliable, honest and trustworthy employee who was "extremely knowledgeable" in

⁶Based on the date of the letter, it appears the document was written and signed the day before both Mr. Barber and Mr. Weil were terminated; that is, the last day Mr. Barber could have signed the letter as the company's Director of Operations. The timing of this letter seems unusual considering that on February 14, 2002, Mr. Barber did not know that Mr. Weil was to be terminated the next day. Additionally, although a Planet Airways logo appears at the top of the letter, it is much larger and slightly out of place than other Planet Airways correspondence signed by Mr. Barber. Additionally, the letter does not carry the company address at the bottom. For a comparison, see RX 11.

passenger services and station operations. Mr. Barber added, "During times of urgency, he has proven to have a cool, clear head and remains focused on the job at hand."

Respondent's Evidence

Sworn Testimony of Mr. Carell Rodriquez (TR, pages 251 to 298)

From October 2001 to August of 2002, Mr. Rodriquez was the human resource manager for Planet Airways. His work location was Fort Lauderdale.

Planet Airways has policies and procedures set out in its employee handbook (RX 1) and General Operations Manual (RX 2) to prevent retaliation against employees who report safety violations.

Mr. Rodriquez knows Mr. Weil from work. He was located just ten offices from Mr. Weil and first met him within a couple of weeks of his employment. As human resource manager, Mr. Rodriquez reviewed Mr. Weil's employment history sometime in November 2001 after he observed an altercation between Mr. Weil and a vice president of maintenance. He took notes commemorating the incident (RX 12). Mr. Weil was "red in color" and appeared "very, very agitated" with the other person. The other individual was calmer and not screaming. Mr. Rodriquez got between Mr. Weil and the vice president and moved Mr. Weil into Mr. Barber's office. Mr. Barber reminded Mr. Weil that they had talked before about his outbursts and they were to stop. He also recalled for Mr. Weil the one week suspension for a previous outburst. That suspension was to be the final notice. In response, Mr. Weil calmed down and apologized. Later, the other individual gave Mr. Rodriquez a document about the incident (RX 14). Based on his other employment experiences, Mr. Rodriquez was surprised to see Mr. Weil's type of behavior in the company's offices.

Mr. Rodriquez has previously seen RX 6 to RX 11 in Mr. Weil's personnel file. On a couple of other occasions, Mr. Rodriquez talked to Mr. Weil about his manner in speaking to other company associates or employees. Then, in the beginning of February 2002, Mr. Weil became upset when the company hired a person to assume responsibility for international passenger services. He told Mr. Rodriquez that he was "going to take off" with all his lists and the company keys and shut the company down. Mr. Rodriquez tried to explain that the new hire did not threaten his job as the domestic passenger services manager.

Mr. Hackert spoke to Mr. Rodriquez about the situation and expressed his frustration with Mr. Weil. Mr. Hackert believed Mr. Weil was keeping information away from the new associate and not cooperating with her. He was argumentative and stated his intention to keep information to himself and to take company property with him. Mr. Hackert commemorated the problems in a document (RX 21) and gave it to Mr. Rodriquez. In response to Mr. Hackert's concern, on February 14, 2002, Mr. Rodriquez spoke with Mr. Garrambone and Mr. DeCamillis. They discussed terminating Mr. Weil. Due to those discussions, Mr. Rodriquez annotated on RX 21 that Mr. Garrambone, Mr. Hackert, and Mr. DeCamillis approved the termination of Mr.

Weil's employment. Although he didn't make the termination recommendation, Mr. Rodriguez supported it.

On February 15, 2002, Mr. Rodriguez was present with Mr. Garrambone when he terminated Mr. Weil. Mr. Rodriguez told Mr. Weil that he was being terminated immediately due to his threats about taking airline passes, his emotional outbursts with customers, and his October 2001 suspension. Mr. Weil seemed surprised but wasn't very responsive. Mr. Rodriguez then went with Mr. Weil and helped him for half an hour remove his personal belongings from his office.

During the discussion to terminate Mr. Weil, and on the morning of his termination, no one mentioned APIS. Neither Mr. Garrambone nor Mr. DeCamillis indicated they were terminating Mr. Weil due to his insistence on APIS.

[Cross examination] RX 21 commemorates a conference call with Mr. Rodriguez and Mr. Hackert in Fort Lauderdale and Mr. Garrambone and Mr. DeCamillis in Orlando. Mr. Rodriguez doesn't specifically recall what prompted the meeting but he believes he called the meeting because Mr. Hackert recommended Mr. Weil's termination in RX 21. The owners of the company, Mr. Garrambone and Mr. DeCamillis, decided to terminate Mr. Weil. They picked February 15, 2002 for the termination date since Mr. Garrambone was already coming down to Fort Lauderdale to terminate Mr. Barber.

Between the November 14, 2001 screaming incident and the activities around February 11, 2002 mentioned by Mr. Hackert, no other complaints against Mr. Weil were documented. At the same time, Mr. Rodriguez did not document every conversation he had with Mr. Weil about his communication style.

In February 2002, Mr. Hackert called Mr. Rodriguez a couple of times about Mr. Weil's behavior. Rather than document the exchanges himself, Mr. Rodriguez asked Mr. Hackert to put his concerns in writing. About a week before his termination, Mr. Weil told Mr. Rodriguez that he was going to shut the company down. He stated he was "going to take stuff out of his office, he was going to take airline passes and keys and lists" so that the company wouldn't be able to fly. That threat was significant. In retrospect, Mr. Rodriguez believes he should have documented that exchange. The only incident he documented was the screaming occasion in mid-November 2001.

Mr. Rodriguez recommended having a police officer present on February 15, 2002. Since the company was terminating both Mr. Barber and Mr. Weil, Mr. Rodriguez wanted to be sure neither individual left with company property. It's possible he requested police assistance on February 12 or 13. Mr. Rodriguez knew about a week in advance that Mr. Barber would be terminated on the 15th.

[ALJ examination] Employee personnel files are kept in the human resources office. Only Mr. Rodriguez and his assistant had access to his office and the personnel files. Mr. Barber did not have access to the office.

Mr. Weil's supervisor was Mr. Barber. Mr. Rodriguez told Mr. Garrambone about the November 14, 2001 incident because he thought it was very serious. Mr. Rodriguez believed Mr. Weil should have been terminated then.

Mr. Hackert's documentation about the week of February 11th concerned Mr. Weil's behavior with the international passenger services employee, who worked in Orlando. Mr. Rodriguez doesn't recall whether he discussed the situation with the other employee. Mr. Hackert's concerns involved Mr. Weil being argumentative and uncooperative. Due to his earlier experiences with Mr. Weil, Mr. Rodriguez believed the contents of Mr. Hackert's memorandum. The reported uncooperative and argumentative attitude was consistent with Mr. Weil's past behavior. Additionally, concerning the resistance to the new employee and threats about company property, Mr. Rodriguez knew those comments were true because Mr. Weil had said the same things to him. Mr. Rodriguez told Mr. Weil those comments were inappropriate but he didn't document that conversation. At the same time, Mr. Rodriguez highlighted that Mr. Weil had already received numerous written counselings and a one week suspension due to his behavior. Mr. Rodriguez believes the company should have terminated Mr. Weil after the mid-November 2001 confrontation. Based on this record, Mr. Rodriguez believes Mr. Weil should not have been surprised by his termination.

[Re-direct examination] When Rodriguez arrived at Planet Airways, the company was a "hornet's nest." Unacceptable conversations were occurring and managers' attitudes needed to be changed about acceptable behavior. Mr. Rodriguez was unaware that Mr. Barber wrote a letter of recommendation for Mr. Weil just before the termination action. Considering the prior disciplinary record that seemed a little odd.

[Re-cross examination] Mr. Rodriguez did not believe the other person in the mid-November 2001 confrontation should have been fired. At the same time, he is unaware of the circumstances that led to the confrontation. He let Mr. Barber handle that situation.

Sworn Testimony of Mr. Anthony DeCamillis
(TR, pages 312 to 359)

Mr. DeCamillis is the President of Planet Airways. He assumed that position in 1998; he has been with the company since its inception in 1995. Planet Airways achieved FAA certification in January 2000 under Part 121. Having started with one plane, the company now operates six Boeing 727 aircraft. Mr. DeCamillis takes pride in Planet Airways as a company that treats people fairly. Its compliance record is also very good. Planet Airways' customers are "ad hoc clients" which may consist of travel or tour groups, business travelers, federal government travelers, and sports teams. In the employee handbook, the company sets out its policy against employee retaliation.

Mr. DeCamillis knows Mr. Weil who worked as a ground handling coordinator and Director of Passenger Services. He didn't have much contact with Mr. Weil. He attended a few meetings in Fort Lauderdale with Mr. Weil. His direct supervisor was Mr. Frank Barber.

Before Mr. Weil's termination, Mr. DeCamillis heard from Mr. Barber about Mr. Weil's problems. Mr. DeCamillis found these exchanges frustrating because Mr. Barber consistently complained about Mr. Weil's behavioral outbursts and combative and argumentative attitude with customers and other employees, yet Mr. Barber continued to employ him.

Prior to Mr. Weil's termination, sometime in February 2002, Mr. DeCamillis had a conversation with Mr. Garrambone and Mr. Rodriguez about the subject. Mr. Rodriguez brought up the subject. The company had already had plans to terminate and replace Mr. Barber. At that time, Mr. Hackert had some "severe complaints" about Mr. Weil. Mr. Hackert's concerns, coupled with Mr. Rodriguez's observations, were "the final straw." According to Mr. DeCamillis, the discussion occurred in Fort Lauderdale where he was working in preparation of removing Mr. Barber. Mr. Rodriguez expressed his concerns with Mr. DeCamillis because he reported directly to the president. Mr. Rodriguez indicated he wanted to bring in a police officer to preclude another outburst. Before the termination decision, Mr. DeCamillis reviewed RX 21.

Mr. DeCamillis does not recall APIS being mentioned in any of the conversations with Mr. Barber or other management personnel about. In the termination discussion, APIS was not mentioned. It did not affect his termination decision.

Mr. Rodriguez made the recommendation to fire Mr. Weil and Mr. Garrambone and Mr. DeCamillis agreed. None of the incidents in Mr. Weil's complaint (RX 22) were involved in his decision to terminate Mr. Weil. None of the incidents were discussed in the termination meeting. Specifically, Mr. DeCamillis was not aware of any complaints by Mr. Weil to the FAA or other authorities about aviation safety violations. He is not aware of any FAA or federal restriction against non-airline entities making their own ground handling arrangements. Likewise, ACMI is an acceptable practice in the industry. Mr. DeCamillis was unaware of the Puerto Rico and the Chicago O'Hare incidents Mr. Weil discusses in his letter.

As far as Mr. DeCamillis knows, neither he nor anyone at Planet Airways has interfered with Mr. Weil's efforts to obtain employment.

Mr. Barber was terminated because DOL determined he had retaliated against employees who voiced safety concerns. He also permitted a hostile, negative, and disruptive work environment. He also was facing other harassment charges. Finally, he was outspoken against the company.

After the implementation of APIS, Planet Airways was cited on two occasions for not having a complete passenger transmittal. The recommended fine was between \$5,000 and \$7,000. However, after Planet Airways representatives met with U.S. Customs officials and demonstrated the corrective actions, the fines were dropped.

[Cross examination] Mr. Hackert's and Mr. Rodriguez's principle concerns about Mr. Weil involved his continuing behavior problem. He was argumentative, uncooperative, very difficult to work with, and engaged in emotional outbursts. Mr. Rodriguez presented the incidents as a basis for termination. Mr. DeCamillis doesn't recall the specifics. Mr. Rodriguez took the lead in the termination discussion. Mr. DeCamillis approved having a police officer

present. Mr. DeCamillis doesn't know when Mr. Rodriquez hired the police officer but he would not dispute that the contact occurred on February 13th. Mr. DeCamillis is sure the termination meeting with Mr. Rodriquez occurred before the 14th while he was still in Fort Lauderdale. Mr. DeCamillis then went to Orlando and later returned on the 13th or 14th for the termination action with Mr. Barber. On the other hand, Mr. DeCamillis had a couple of conversations with Mr. Rodriquez about the termination. He believes they discussed the subject again on the 14th although the decision to terminate occurred earlier than that day. As a result, Mr. DeCamillis agrees that RX 21, dated February 14, 2002 was not in his possession when the decision to terminate Mr. Weil was made. The date on RX 21 possibly reflects when it was formalized rather than drafted.

Mr. DeCamillis based his decision to terminate Mr. Weil in part on Mr. Rodriquez's presentation. Additionally, he relied on Mr. Barber's complaints about Mr. Weil's behavior. During the termination discussion, Mr. Hackert was not present. Instead, Mr. Rodriquez relayed Mr. Hackert's concerns.

[ALJ examination] Mr. DeCamillis probably actually saw RX 21 on February 14, 2002 but he may have seen a draft earlier. However, Mr. DeCamillis was not aware of either Mr. Weil's refusal to share contracts with vendors or his failure to act on the APIS directive. Of the incidents set out on RX 21, he was aware of Mr. Weil's uncooperative attitude towards a new employee, his continued display of an uncooperative and argumentative attitude, and his threats to take company property. He learned about the later two incidents from Mr. Garrambone.

Mr. Barber reported directly to Mr. DeCamillis. During his conversations with Mr. Barber, Mr. Barber typically mentioned problems with Mr. Weil. Mr. Garrambone handled the operations aspects of Planet Airways. Mr. DeCamillis focused on financial matters. As a result, while Mr. Barber technically reported to Mr. DeCamillis, Mr. Barber had more contact with Mr. Garrambone. After the DOL investigations and Mr. Rodriquez's review in the fall of 2001, Mr. Barber was essentially cut out of the management decisions on Mr. Weil. Mr. Barber never told Mr. DeCamillis why he kept Mr. Weil around. Instead, Mr. Barber would indicate that he was planning to terminate or remove him. Mr. Barber indicated Mr. Weil did some things well; however, the problems were more prevalent.

Mr. DeCamillis may be confused about the dates about the termination discussion and Mr. Rodriquez's documentation. He is certain that they didn't just terminate Mr. Weil without any "due process."

[Re-direct examination] The decision to terminate Mr. Barber came first.

The company Christmas bonus in 2001 was given across the board. It was based on employment, not performance.

[Re-cross examination] Sometimes Mr. Rodriquez relied on managers to document problems.

Planet Airways Employee Handbook
(RX 1)

Section 1, page 4: The company believes in direct communication. However, the company also expects problems to be discussed and resolved in a mutually respectful atmosphere.

Section 2, page 4: Pay raises may be based on either improved or sustained good performance.

Section 4, page 1: "The opinions and attitudes that clients have toward our company may be determined for a long period of time by the actions of one individual." The company can not overemphasize the importance of professional conduct when working with its clients. "Each employee must be sensitive to the importance of providing courteous treatment in all working relationships."

Section 4, page 5: Corrective personnel actions, including termination, may be taken in response to: 1) violating company policies, 2) insubordination, . . . 8) verbal harassment, 9) disrespect toward fellow employees, . . . 14) use of obscene, abusive or threatening language, . . and 17) failing to exemplify the mission, culture, and values of the company.

Planet Airways General Operation Manual Extract
(RX 2)

Planet Airways is an air carrier authorized to conduct supplemental operation for the carriage of passengers (PA # 206). Under the organizational table for flight operations, the Director of Passenger Services reports to the Vice President/Director of Operations (PA #302). The corporate offices are located in Orlando, Florida; operations are conducted in Fort Lauderdale (PA # 303). The Director of Passenger Services is responsible for portions of trip planning, including ground handling, refueling, catering, customs and immigration (PA # 313).

Record of Verbal Warning
(RX 6, RX 20, and RX 23)

On July 17, 2001, Mr. Frank Barber warned Mr. Weil about his rude and obnoxious communications with customers on many occasions. Mr. Weil was also argumentative, combative and negative with co-workers. He was loud and caused disturbances in the office.

Record of Verbal Warning
(RX 7, RX 20, and RX 23)

On August 9, 2001, Mr. Barber counseled Mr. Weil that scheduling changes were to be expected. He was told to stop acting exasperated and disgusted every time a change occurred.

Record of Verbal Warning
(RX 8, RX 20, and RX 23)

On October 11, 2001, Mr. Barber spoke to Mr. Weil about customer complaints that sales personnel had received about his loud, abusive and argumentative responses to customers. Mr. Barber “very forcefully” warned Mr. Weil such behavior must “cease.” Urging Mr. Weil to be helpful to customers rather than being a road block, Mr. Barber explained to Mr. Weil the proper method for interacting with customers.

Record of Verbal Warning
(RX 9, RX 20, and RX 23)

On October 15, 2001, Mr. Barber discussed a complaint he had received from an aircrew about his use of football tickets meant for them. Mr. Barber counseled Mr. Weil about making personal visits when flying on Planet Airways. He observed that every time Mr. Weil goes on such trips, Mr. Barber receives a complaint. Mr. Barber noted Mr. Weil’s response was argumentative.

Record of Verbal Warning
(RX 10, RX 20, and RX 23)

On October 18, 2001, Mr. Barber talked to Mr. Weil again. This time, he had received a complaint from Mr. Hackert about Mr. Weil’s argumentative response to Mr. Hacker’s request to make a change requested by a customer. According to Mr. Barber, all Mr. Weil had to do was make one phone call. Instead, he argued and challenged the decision to make the change. This incident caused a major disruption in the office. Mr. Barber stated, “This scene is a repeat of many other times. He just won’t stop arguing and simply do his job.”

Suspension Letter
(RX 11, RX 20, and RX 23)

Also on October 18, 2001, Mr. Barber suspended Mr. Weil from work without pay for one week effective Monday, October 22, 2001 through October 26, 2001 due to the recurring nature of performance deficiencies. Despite numerous documented deficiencies in the performance of Mr. Weil’s responsibilities as Director of Passenger Services, Mr. Barber observed that “similar incidents under equal circumstances continue to occur.” The specific deficiencies were: 1) lack of cooperation in responding to customer changes and requests; 2) lack of judgment in matters involving customer service that lead to customer complaints; 3) initiation of arguments with customers and co-workers; 4) failure to develop and maintain a database of ground handling charges as directed; and, 5) repeated verbal threats of resignation to the CEO, Vice President of Sales, and Mr. Barber.

Mr. Barber warned Mr. Weil that the suspension was the final disciplinary action and stated that any “further incidents will result in immediate termination.” Additionally, any verbal threats of resignation would be considered a formal offer of resignation. In closing, Mr. Barber

expressed his hope that the suspension would “achieve a satisfactory result” and the Mr. Weil’s job performance would improve.

Mr. Carell Rodriquez’s Note
(RX 12, RX 20, and RX 23)

In a November 14, 2001 memo, Mr. Rodriquez indicated that he heard Mr. Weil screaming at another employee. When he tried to intervene, Mr. Weil screamed at Mr. Rodriguez about the other person attempting to obtain airline passes. Mr. Rodriguez took Mr. Weil into Mr. Barber’s office. Mr. Barber told Mr. Weil his behavior was unacceptable. Mr. Weil calmed down and apologized.

Employee Statement
(RX 14 and RX 20)

In a November 14, 2001 statement, a Planet Airways employee stated that due to past difficulties with Mr. Weil, he attempted to obtain reduced fare airline passes on his own. Mr. Weil was greatly offended by his attempt and yelled at the employee who was in “upper management,” using abusive language. Several other employees observed the incident. The employee objected to Mr. Weil’s “unprofessional demonstration” in the office and his insubordination.

Mr. Michael Hackert’s Written Statement
(RX 19)

On September 9, 2002, Mr. Hackert, who had been the Vice President for Sales and Marketing since the summer of 2001, completed a written statement about his experiences with Mr. Weil. Mr. Hackert explained that after sales closed a deal with a customer, the customer then had to deal with Mr. Weil in executing the details of the contract. Mr. Hackert received numerous customer complaints about Mr. Weil’s habit of waiting to the last minute to contact them. Also, he was inflexible in regards to changes. For example, in October 2001, when a customer requested an airfield change, Mr. Weil “flew off the handle” at the customer and Mr. Hackert. Eventually the change was made.

Planet Airways regularly engages in ACMI contacts. It is legal for ACMI customers to make their own ground handling requirements.

Mr. Weil was very rude and discourteous to co-workers; he often yelled.

Although Mr. Weil first was notified of APIS in about October 2001, he did not bring the APIS requirements to the company’s attention until February 2002. Once they became aware of the APIS requirements, Planet Airways very quickly prepared a computer program.

Mr. Weil relied on one company for international ground handling operations. That practice generated high costs. Planet Airways brought in another person who had international operations experience as a resource for Mr. Weil. However, Mr. Weil didn’t like the

arrangement and went out of his way to be uncooperative. The new employee was not hired to replace Mr. Weil.

Concerning the February 14, 2002 memorandum, Mr. Hackert had asked Mr. Weil for copies of vender contracts in order to check rates for certain ground handling charges. Mr. Weil refused, claiming the copies were his property, but the documents did not belong to him. When the new employee for international ground handling asked Mr. Weil, he again refused to turn over the copies.

Mr. Weil “frequently threatened to resign when I asked him to [do] something he didn’t want to do.” Mr. Hackert heard Mr. Weil “threaten on several occasions that he would take his keys, airline passes, etc. if he walked out.”

Mr. Michael Hackert’s Written Statement
(RX 21)

On February 14, 2002, Mr. Hackert prepared a memorandum recommending the termination of Mr. Weil’s employment due to ongoing and severe issues concerning Mr. Weil’s job performance. First, in the prior few days, Mr. Weil had refused to provide copies of Planet Airways contracts with ground handling vendors. Mr. Hackert requested the documents in order to review ground handling rates to ensure appropriate costs were being included in charter customer quotes. Second, Mr. Weil failed to act promptly when he was notified of APIS in December 2001. Instead, he waited until February 4, 2002 to notify Sales of the APIS requirements that were becoming effective February 18, 2002. Third, Mr. Weil demonstrated a “generally uncooperative attitude” toward the new international passenger services employee. He took this approach despite being directed by the CEO to cooperate in an effort to review international passenger services. Fourth, Mr. Weil’s uncooperative and argumentative attitude extended to routine issues in addition to the new ground handling procedures and the new employee. Fifth, Mr. Weil presented “ongoing verbal threats of resignation.” He threatened to take “company property such as keys, contact information, and other proprietary information.”

A handwritten annotation at the bottom of the memorandum reads: “Discussed w/ Peter, Mike, and Tony. Approved. 2/14/02.”

Mr. Carell Rodriquez’s Written Statement
(RX 23)

On March 20, 2002, Mr. Rodriquez, on Planet Airways’ behalf, responded to Mr. Weil’s AIR 21 allegations. Planet Airways denied Mr. Weil was discharged due to his concerns about implementation of safety and security procedures. According to Mr. Rodriquez, the company separated Mr. Weil due to his misconduct. After several warnings and a one week suspension, Mr. Weil was involved in another employee confrontation in November 2001. In February 2002, Mr. Weil did not respond well to the company’s decision to hire a new employee for international passenger services. He disrupted the performance of her duties by refusing to share company information about ground handling vendors, failing to perform his duties, and being

uncooperative. Mr. Weil also threatened to leave the company and take company property with him.

Job Description
(RX 38)

A job analysis questionnaire for the position of Director of Passenger Services lists “patience and self-control” as requisite skills.

Planet Airways APIS Instructions
(RX 39)

Planet Airways’ written APIS instructions requires the customers to promptly provide passenger information to Planet Airways so that the company in turn can transmit the data in the required format. Planet Airways warns that an aircraft will not be permitted to depart the terminal gate without an APIS clearance.

U.S. Customs APIS Announcement
(RX 40)

U.S. Customs indicates APIS will be introduced in three phases. In the first phase, effective February 18, 2002, APIS transmission is required for all flights and pilots will be assessed civil penalties for failure to comply. In the second phase, effective April 1, 2002, the minimum standard for an APIS transmission will be 70% in terms of completeness and accuracy. Noncompliance carries a \$5,000 penalty. The third phase, starting June 1, 2002, raises the minimum accuracy standard to 97% with a \$5,000 non-compliance penalty.

Press Release
(RX 47)

A November 21, 2001 press release announces the enactment of the Aviation and Transportation Security Act and the implementation of the requirement to transmit information on inbound international passengers to U.S. Customs.

Deposition of Ms. Diane Halloran
(RX 49)

In an August 18, 2003 deposition, Ms. Diane Halloran, an FAA Aviation Safety Inspector, testified that she had some contacts with Mr. Weil during her numerous official visits to Planet Airways. Although he occasionally talked about ground handling issues, she did not consider them to be safety issues. She never conducted a safety investigation based on a complaint by Mr. Weil.

OSHA Letter
RX 63

In a June 5, 2002 Decision Letter, the Regional Administrator explained that she determined Planet Airways had not violated AIR 21 in regards to Mr. Barber's termination. The Regional Administrator summarized evidence that indicated in November 2000 Planet Airways started to look for a replacement for Mr. Barber and was engaged in recruiting efforts by August 2001. Interviews of candidates were conducted through November 2001 and Mr. Barber's replacement was hired on February 15, 2002, the day of Mr. Barber's termination.

Personnel Action Notice
RX 67

According to a personnel action notice, Planet Airways hired Ms. Maricarmen Scott, effective February 4, 2002, as the "Dir. Of Passenger Services." The action is authorized on March 7, 2002 by Mr. Rodriquez.⁷

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Credibility and Probative Weight Findings

While most of the witnesses were generally believable and provided credible testimony, some conflicts in testimony and inconsistencies require that I occasionally make credibility assessments and associated probative value determinations. Within double brackets (|| ||) in the following specific findings, I will discuss in more detail my assessment of such testimonial conflict.

Specific Findings

May 2000 Mr. Weil joins Planet Airways as a flight operations coordinator and within the next few months becomes the Director of Passenger Services, working at the company's operations base in Fort Lauderdale, Florida. His direct supervisor is Mr. Frank Barber. A job analysis questionnaire for the position lists "patience and self-control" as requisite skills. The company's employee handbook establishes that problems are to be discussed and resolved "in a mutually respectful atmosphere." The handbook also emphasizes the importance of "professional conduct when working with its clients." Planet Airways adds that each employee must "be sensitive to the importance of providing courteous treatment in all working relationships."

August 2000 to April 2001 Mr. Barber approves two salary increases for Mr. Weil. Mr. Barber considers Mr. Weil to be a solid performer. In December 2000, Mr. Garrambone receives a letter of appreciation from a customer in part praising Mr. Weil's work.

⁷The signature on this document matches Mr. Rodriquez's signature on his March 20, 2002 written statement (RX 23).

Summer 2001 Mr. Hackert arrives at Planet Airways to become the Vice President for Sales and Marketing. He works in the company's corporate offices in Orlando, Florida.

July 17, 2001 [[The record contains five written records of verbal warning, RX 6 to RX 10. In a written statement, Mr. Weil denies ever receiving a "written verbal warning." However, significantly, Mr. Weil did not deny that Mr. Barber talked to him about the issues commemorated in the written records of the verbal warnings. Consequently, in the absence of a specific denial and even though Mr. Weil may not have received a formal document, I conclude Mr. Barber counseled Mr. Weil on July 17, 2001, August 9, 2001, October 11, 2001, and October 17, 2001.⁸]]

Based on directions from Mr. Garrambone, Mr. Barber counsels Mr. Weil about being argumentative and combative with co-workers. He explains to Mr. Weil that he is causing loud disturbances in the office. Mr. Barber also counsels Mr. Weil about being rude and obnoxious to customers on many occasions.

August 9, 2001 Again, at Mr. Garrambone's insistence, Mr. Barber counsels Mr. Weil about his behavior in response to a scheduling change. While he doesn't believe Mr. Weil has actually interfered with any scheduling and feels the warning is unfair, Mr. Barber does advise Mr. Weil not to act disgusted and exasperated "every time" a scheduling change occurred.

October 11, 2001 While speaking with Mr. Weil, a customer flies into a rage. Mr. Weil reacts with loud, abusive and argumentative language. The customer complains to Mr. Hackert, who in turn passes the customer complaint to Mr. Barber. Although Mr. Barber understands Mr. Weil's frustration with having to deal with problems that may have been generated by Mr. Hackert's sales efforts, he nevertheless forcefully counsels Mr. Weil to stop his "reactions" to irate customers because such behavior was not acceptable. He urges Mr. Weil to be helpful to customers and explains how to properly interact with customers. If Mr. Weil can't deal with a customer, Mr. Barber tells him to pass the customer to him.

October 17, 2001 Mr. Hackert presents a customer-requested change to Mr. Weil for action. Believing the request will be denied by an airport authority, Mr. Weil becomes argumentative, challenges Mr. Hackert's request and causes an office disruption. Eventually, Mr. Weil makes the call and the customer is partially accommodated. In counseling Mr. Weil about the exchange, Mr. Barber notes this incident is a repeat of several other occasions. He tells Mr. Weil to stop arguing with Mr. Hackert and just do his job.

October 18, 2001 For a period of time prior to this day, Mr. Weil has occasionally made verbal threats to resign to Mr. Garrambone, Mr. Hackert and Mr. Barber.

Due to recurring customer complaints, uncooperative attitude in handling changes, poor judgment in the area of customer service, the initiation of arguments with customers and co-workers, failure to prepare a ground handling costs database, and repeated resignation threats,

⁸Since upon full investigation of the aircrew complaint, Mr. Barber determined the warning was not warranted, I conclude the October 13, 2001 aircrew complaint and the corresponding record of verbal warning (RX 9) are not particularly relevant on the issue of Mr. Weil's employment suitability.

Mr. Garrambone and Mr. Hackert come to the conclusion that Mr. Weil should be fired. Disagreeing and considering Mr. Weil to be a valuable and productive worker, Mr. Barber is able to negotiate a one week suspension instead. In the suspension letter, Mr. Barber sets out the reasons mentioned above for the suspension. Mr. Weil is informed that the suspension is the final disciplinary action and any further incidents will lead to separation. Mr. Barber adds that any threats of resignation will be considered formal offers.

October 21 through October 25, 2001 Mr. Weil is removed from the Planet Airways' payroll. During this period, Mr. Weil concludes he should let Mr. Barber handle Mr. Hackert.

By the end of October 2001 Mr. Carell Rodriquez is hired as the Human Resource Manager for Planet Airways. He works in the Fort Lauderdale operations complex.

Mr. Barber has discussions with Mr. DeCamillis about Mr. Weil. Although Mr. Weil does some types of work well, Mr. Barber complains that he also has an argumentative and uncooperative attitude with customers and other employees. Mr. Barber also indicates that Mr. Weil has emotional outbursts.⁹

October 27 to November 13, 2001 Mr. Weil does better with his co-worker and customer relationships. Mr. Barber receives no complaints in either area during this period.

November 14, 2001 [[Mr. Weil maintains that when he confronted and yelled at another employee about an attempt to receive free airfare passes, that employee also yelled and attempted to start a fight. At the same time, Mr. Weil acknowledged that he used profanity in the exchange. Mr. Rodriquez states that he was disturbed in his office and drawn to investigate the altercation based on Mr. Weil's yelling. Mr. Rodriquez observed that of the two individuals, Mr. Weil was in an agitated state; whereas, the other person was not screaming. Notably, Mr. Rodriquez took Mr. Weil, and not the other individual, into Mr. Barber's office to calm the situation. Finally, while Mr. Rodriquez commemorated this event in writing on November 14, 2001, Mr. Weil's recollection at the September 2003 hearing is based solely on memory. As a result, I find Mr. Rodriquez's version of the altercation more reliable than Mr. Weil's recollection.]]

After learning that another executive, the vice president for maintenance, has attempted to obtain a reduced fare airline pass using one of Mr. Weil's business contacts, Mr. Weil confronts the executive and becomes very agitated and yells, using profanity. When Mr. Rodriquez attempts to intervene, Mr. Weil also screams at him about the vice president's actions. The exchange is overheard by other people in the office. Mr. Rodriquez takes Mr. Weil to Mr. Barber's office. Mr. Barber tells him such behavior is unacceptable. Mr. Rodriquez reminds him about the prior one week suspension. Mr. Weil becomes calm and apologizes.

After this incident, in his capacity as Human Resource Manager, Mr. Rodriquez reviews Mr. Weil's personnel file. Considering Mr. Weil's outburst very serious and believing he should be separated, Mr. Rodriquez informs Mr. Garrambone about the incident.

⁹Mr. DeCamillis did not give the exact timing for these complaints. He only indicated that Mr. Barber had presented his comments about Mr. Weil's performance sometime before February 15, 2002.

November 19, 2001 The Aviation and Transportation Security Act is enacted and requires airlines flying passengers from a foreign country into the United States provide a crew and passenger manifest to U.S. Customs by electronic transmission prior to the arrival of the aircraft in the United States.

December 31, 2001 U.S. Customs publishes a regulation requiring the submission of the requisite passenger manifests through an approved electronic data transmission system.

Between December 2001 and February 4, 2002 Sometime during this period, Planet Airways uses Ms. Maricarmen Scott as an outside contractor to conduct a cost analysis of ground handling expenses for international flights. Unsure of Ms. Scott's status, Mr. Barber hesitates to cooperate. Believing Ms. Scott is not authorized to receive proprietary information as a contractor, Mr. Weil also refuses to cooperate with her. Eventually, Mr. Garrambone confirms her status and Mr. Barber instructs Mr. Weil to cooperate.

Sometime during this period, U.S. Customs announces a three stage phase-in for APIS. In the first phase, APIS transmissions are required, effective February 18, 2002. In the second stage, starting April 11, 2002, at least 70% accuracy in the transmission content is required. In the final phase, starting June 1, 2002, 97% accuracy is mandated. A \$5,000 penalty will be imposed for noncompliance with the requirements in the second and third stages.

February 4 and 5, 2002 Mr. Thompson and Mr. Weil attend a U.S. Customs' seminar on the implementation of APIS. The transmission of international passenger manifests prior to aircraft arrival in the United States is required under the recently enacted Aviation and Transportation Safety Act. The APIS requirements are designed to protect national security and enhance aviation safety. At the seminar, U.S. Customs representatives present a software program, which is already being used by a few major airlines, that complies with APIS. Implementation of the APIS transmission requirement will occur on February 18, 2002. The fine for noncompliance is \$5,000.

February 5, 2002 [[Four participants in the February 5, 2002 telephone conference call testified about its content. Although none of the individuals really contradicted each other, some of the witnesses provided a less complete version than others. My findings on the conference call reflects a blending of their recollections.]]

Upon the return of Mr. Thompson and Mr. Weil from the U.S. Customs' seminar, a telephone conference call is conducted concerning the implementation of APIS. The participants in Orlando, Florida are Mr. Garrambone, CEO, and Mr. Hackert, Vice President of Sales and Marketing. In Fort Lauderdale, Mr. Barber, Director of Operations, Mr. Bainton, Director of Safety, Mr. Weil, Director of Passenger Services, and Mr. Thompson, Security Coordinator are on the other end of the phone line. Mr. Weil explains the APIS requirements, the implementation date of February 18, 2002, and the monetary fines associated with non-compliance. Considering the impending implementation date, Mr. Weil states that use of an existing software program, which costs \$10,000, is the only choice to ensure timely compliance.

In response, Mr. Garrambone states he does not want to spend that amount of money and intends to find another solution. Mr. Hackert resists the APIS requirements, does not believe the situation is an emergency, is reluctant to impose the program on their clients, and disagrees with Mr. Weil's proposal to use pre-existing software. Mr. Garrambone states the company will take care of compliance itself with its own programmers. Mr. Barber states he will need an expert to come to Fort Lauderdale and develop the APIS format. Mr. Garrambone indicates he will send someone to Fort Lauderdale. Mr. Weil continues to challenge Mr. Garrambone's decision arguing they do not understand the urgency of the situation. Mr. Weil doubts the company can achieve compliance on its own and vehemently urges his approach indicating failure to comply will threaten the company's flight operations. Mr. Garrambone and Mr. Hackert again respond that they will take care of APIS compliance. Mr. Garrambone then ends the telephone conference call.

February 6 to February 14, 2002 [[According to Mr. Weil, at some unspecified time during this period, on one occasion, Mr. Garrambone told him that he wouldn't comply with APIS. While Mr. Garrambone didn't testify and refute that assertion, I find based on other evidence in the record that Planet Airways did intend to comply with APIS, albeit in a different manner than recommended by Mr. Weil. Specifically, in the February 5, 2002 telephone conference call, all the participants testified that Mr. Garrambone stated Planet Airways would meet the APIS requirements. Mr. Weil also testified that over the course of the following week, the more typical response from Mr. Garrambone was a commitment to comply. Additionally, other than the two occasions mentioned by Mr. DeCamillis, Planet Airways appears to have complied with the APIS requirements.]]

Over the course of the next few days, when no one arrives in Fort Lauderdale to address the implementation of APIS, Mr. Weil makes repeated calls to Mr. Garrambone expressing his concerns about the lack of company action on APIS. Mr. Garrambone usually replies that the company will take care of compliance. Eventually, Mr. Weil is unable to get through to Mr. Garrambone over the phone.

About this period, Mr. Hackert arrives in Fort Lauderdale with Ms. Maricarmen Scott, who has been designated the Director of International Passenger Services. Mr. Hackert directs Mr. Weil to work with Ms. Scott. Believing Mr. Hackert does not have the authority to make that arrangement, Mr. Weil refuses to work with her and does not permit her to look at office files relating to his work. Mr. Weil and Ms. Scott have a loud exchange about his refusal. Mr. Hackert also asks Mr. Weil to give Ms. Scott access to his files and contracts. Mr. Weil refuses the request and threatens to resign due to Mr. Hackert's interference. Mr. Weil refuses to give Ms. Scott access to his files unless he receives that order from Mr. Barber or Mr. Garrambone. After a few days, Ms. Scott leaves Fort Lauderdale and goes to work in Orlando.

[[According to Mr. Rodriguez, Mr. Weil made other threats during this period about taking his airline passes, keys, and lists with him and shutting down the company. Mr. Weil denies he ever threatened to take company property. Having found both witnesses generally credible and recognizing they are testifying through the respective perception filters, I conclude that, during this time frame, as Mr. Rodriguez stated, Mr. Weil presented more than just a simple threat to resign. At the same time, Mr. Weil was not necessarily threatening to take property that

he thought belonged to Planet Airways. Instead, Mr. Weil's collateral threats related to items he believed were directly linked to his presence in the company. For example, as demonstrated by the November 21, 2001 incident, Mr. Weil's industry connections appear to be responsible for the reduced fare airline passes. Likewise, over the course of his 25 years in the industry, Mr. Weil may very well have developed lists of professional contacts. Understandably, Mr. Weil thought this information belonged to him and its absence upon his departure would adversely affect Planet Airways' success. Of course, the difficulty with Mr. Weil's presentation is that while Mr. Weil was making threats about removing his professional property from the company, Mr. Rodriguez and Mr. Hackert reasonably interpreted his comments as threats to take Planet Airways' property. I also note that in his written response to Planet Airways' allegations about his threats, Mr. Weil did not deny that he stated a belief that his departure would shut down Planet Airways.]]

In addition to his threat to resign, Mr. Weil tells Mr. Hackert and Mr. Rodriguez that when he leaves, he will take his airline passes, keys, and lists, and shut down the company. Mr. Rodriguez tells Mr. Weil that his threats are inappropriate. Mr. Garrambone learns of these threats and informs Mr. DeCamillis.

[[Though Mr. Rodriguez and Mr. DeCamillis testified about the process associated with the decision to terminate Mr. Weil, they presented slightly different versions about the sequence of the decision making process and the basis for the process. According to Mr. Rodriguez, he merely brought Mr. Hackert's termination recommendation, RX 21, to the attention of Mr. Garrambone and Mr. DeCamillis on February 14, 2002. Based on the reasons set out by Mr. Hackert, Mr. Garrambone and Mr. DeCamillis decided to terminate Mr. Weil effective the next day. On the other hand, Mr. DeCamillis testified that Mr. Rodriguez recommended Mr. Weil's termination and the termination decision was made several days before February 14, 2002. Additionally, based on the February 14, 2002 date of Mr. Hackert's letter and because Mr. DeCamillis was not aware of all the incidents set out in the letter, Mr. DeCamillis believes that RX 21 was not before him when he made the decision to separate Mr. Weil. In sorting through this factual morass, I first emphasize that I found Mr. Rodriguez to be a credible witness. Similarly, I also found Mr. DeCamillis to be an exceptionally candid and sincere witness who readily acknowledged some confusion about the sequence of events. However, significantly, Mr. DeCamillis was not confused about the reasons he decided Mr. Weil should be terminated. In other words, while RX 21 caused some confusion during Mr. DeCamillis' testimony, he remained very clear that Mr. Weil's uncooperative attitude, his resignation threats, and Mr. DeCamillis' understanding of Mr. Weil's previous conduct problems caused him to conclude Mr. Weil should be fired. In light of their credibility, and considering that during this time frame Mr. Garrambone, Mr. DeCamillis, and Mr. Rodriguez were also engaged in replacing the Director of Operations for Planet Airways, I attribute the noted inconsistencies to the vagaries of memory. Essentially, I rely on Mr. Rodriguez's recollection for the sequence of events and Mr. DeCamillis' testimony for the basis of his termination decision.]]

During the course of a week, on several occasions, Mr. Hackert contacts Mr. Rodriguez to discuss his frustration with Mr. Weil. According to Mr. Hackert, although Ms. Scott has been hired to work as the Director of International Passenger Services with Mr. Weil, Mr. Weil refuses to cooperate and is withholding company information. His uncooperative and

argumentative attitude towards the new employee was an extension of his uncooperative attitude in general. Mr. Hackert indicates that Mr. Weil has made verbal threats to resign and take company property with him. Mr. Hackert adds that Mr. Weil inappropriately delayed telling him about the implementation date for APIS. For these reasons, Mr. Hackert believes Mr. Weil should be terminated. Mr. Rodriguez asks Mr. Hackert to place his concerns in writing.

Agreeing with Mr. Hackert's termination recommendation, Mr. Rodriguez brings at least a few of Mr. Hackert's concerns to the attention of Mr. Garrambone and Mr. DeCamillis. By the time of this meeting, Mr. Barber's employment termination has already been scheduled for February 15, 2002. Mr. Rodriguez reports that Mr. Weil has a continuing behavior problem as demonstrated by his uncooperative and argumentative response to the new Director of International Passenger Services. Mr. Weil also has continued to make resignation threats and indicates that he will take company property with him. Mr. Garrambone and Mr. DeCamillis agreed that Mr. Weil should be terminated on February 15, 2002. By February 14, 2002, Mr. Hackert has formalized his concerns in a document (RX 21). On February 14, 2003, Mr. Rodriguez's annotates on the document that Mr. Garrambone, Mr. DeCamillis and Mr. Hackert have approved Mr. Hackert's recommendation that Mr. Weil be terminated.

[[The parties spent some time attempting to establish when the request for a police officer to be present on February 15, 2002 was made and why. Though the answers to those questions were somewhat varied, the timing of the request was not an issue that needed to be resolved and the presence of law enforcement on the day of Mr. Barber's and Mr. Weil's termination was not unreasonable, especially considering Mr. Weil's previous threats.]]

Concerned about potential problems associated with the termination of Mr. Barber and Mr. Weil, Mr. Rodriguez arranges to have a police officer present on February 15, 2002 at the Planet Airways operations office in Fort Lauderdale

February 15, 2002 Planet Airways terminates Mr. Frank Barber as the Director of Operations. When he arrives at work, Mr. Weil learns about Mr. Barber's termination, a short time later, Mr. Garrambone, with Mr. Rodriguez present, terminates Mr. Weil's employment with Planet Airways. Mr. Weil is surprised and shocked by the action.

[[According to Mr. Weil, when he asked Mr. Garrambone the basis for his discharge, Mr. Garrambone replied, "No reason at all." Mr. Rodriguez recalls that he told Mr. Weil the termination decision was based on his prior suspension, his outbursts and threats about company property. In resolving this dispute, I give more probative weight to Mr. Rodriguez's representation for a couple of reasons. First, Mr. Weil didn't address whether Mr. Rodriguez gave him any reasons for his termination. He only indicated that he received no information from Mr. Garrambone. Second, the sudden nature of the termination and Mr. Weil's apparent surprise may have affected the accuracy of his recollection. Obviously, Mr. Rodriguez was not experiencing such a response at the announcement of the termination.]]

Mr. Rodriguez tells Mr. Weil the termination decision was based on his prior suspension, his outbursts, and threats about company property. After retrieving some personal property in his former office, Mr. Weil is escorted off the premises.

Post February 15, 2002 After Mr. Weil's departure, Ms. Scott, the employee who had been hired to handle international passenger services becomes the Director of Passenger Services for Plant Airways. Despite internet searches, some direct contacts, and a few interviews, Mr. Weil is unable to find re-employment in the airline industry.

Case in Chief

Under 42 U.S.C. § 42121 (b) and 29 C.F.R. § 1979.109, to establish that a respondent has committed a violation of the employee protection provisions of AIR 21, a complainant must prove by a preponderance of the evidence that an activity protected under AIR 21 was a contributing factor in the unfavorable personnel action alleged in the complaint.¹⁰ Courts have defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action, *Marano v. U. S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). The activities protected under 42 U.S.C. § 421421 (a) (1) include reports of information to an employer or the Federal Government of a violation of Federal law or FAA regulation, standard or order relating to air carrier safety. Based on these principles, to establish a violation of AIR 21, a complainant must prove three elements: 1) protected activity; 2) unfavorable personnel action; 3) causation in terms of contributing factor.

Issue No. 1 - Protected Activity

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, ("Secretary") has broadly defined "protected activity" as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.*, 92 SWD 1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91 SWD 2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and *Dodd v. Polysar Latex*, 88 SWD 4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95 CAA 12 (ARB Apr. 8, 1997).

¹⁰In their respective closing briefs, the parties discuss the concept of a *prima facie* case. In other types of whistleblower discrimination cases, a complainant may establish a *prima facie* case of discrimination by showing: a) he engaged in a protected activity; b) the employer was aware of the protected activity; c) the employee suffered an unfavorable personnel action; and d) the circumstances were sufficient to raise an inference that the protected activity was likely a contributing factor. In AIR 21 cases, that type of analysis only applies to the investigative phase. See 29 C.F.R. § 1979.104 (b). Moreover, in other types of whistleblower cases, if the respondent provides contrary evidence, the *prima facie* case becomes irrelevant and the inquiry turns to whether the protected activity was a contributing factor in the unfavorable personnel action. See *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352 (8th Cir. 1996) (case below *Carroll v. Bechtel Power Corp.*, 91 ERA 46 (Sec'y February 15, 1995)).

The implicit purpose of the employee protection provisions of AIR 21, to encourage the reporting of matters involving or relating to violations of any federal law or FAA order, regulation, or standard concerning air carrier safety, also affects the scope of protected activity. 49 U.S.C. 42121 (a) (1). The Supreme Court noted in a parallel statute, that the statute's language must be read broadly because "[a] narrow hyper-technical reading" of the employee protection provision of the Act would do little to effect the statute's aim of protecting employees who raise safety concerns. *Kansas Gas & Electric Co.*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986). Such statutes have a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). As a result, the courts and the Secretary have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in nuclear and environmental acts. See S. Kohn, *The Whistle Blower Litigation Handbook*, pp. 35-47 (1990).

Although the above principles were developed in environmental whistleblower cases, the underlying purpose for whistleblower protection and associated principles are readily adaptable to AIR 21 cases. Consequently, a protected activity under AIR 21 has three components. First, the report or action must involve a purported violation of a Federal law or FAA regulation, standard or order relating to air carrier safety and at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his safety concern to either his employer or the Federal Government (49 U.S.C. § 42121 (a) (1)).

In his written AIR 21 complaint, Mr. Weil alleged at least four protected activities contributed to his termination. First, Mr. Weil asserted he was forced to agree to conduct charter flights that bypassed FAA security directives for passenger screening. Second, Mr. Weil complained to Mr. Barber about Planet Airways' practice of permitting customers to make their own ground handling arrangements. Third, Mr. Weil believed he was forced to arrange a flight into an airport that was not allowing charter flights. Fourth, in February 2002, just before his termination, Mr. Weil presented to company management the new APIS requirements and associated noncompliance penalties.

At the hearing, Mr. Weil identified only the last action, his advocacy of APIS compliance, as the sole protected activity in this case. Accordingly, my principle focus on whether Mr. Weil engaged in a protected activity under AIR21 relates to his APIS concerns.

Prior to discussing Mr. Weil's principal protected activity as presented at the hearing, I find that the three other incidents mentioned in Mr. Weil's written AIR 21 complaint were not protected activities and, for the reasons discussed later in greater detail concerning the circumstances of his discharge, did not contribute to his termination. In regards to the first two allegations, Mr. Weil presented examples of incomplete passenger screening and unannounced aircraft arrival as the predictable consequences of permitting charter customers to arrange their own ground handling logistics. While these incidents could have air safety implications, Mr. Weil did not present any evidence that permitting charter customers to make ground handling arrangements with other contractors, rather than Plant Airways (and Mr. Weil), constitutes a

violation of any Federal law or FAA regulation, standard or order. To the contrary, evidence¹¹ was presented that such contractual arrangements, where Planet Airways simply provides the aircraft, crew, maintenance and insurance, did not violate any legal aviation standard. Additionally, any reaction Planet Airways took in response to Mr. Weil's complaints on this issue related to his choice of behavior in presenting his concerns, and not the substance of his complaints – a persistent theme with Mr. Weil's employment at Planet Airways.

Concerning Mr. Weil's complaint about flying aircraft into inappropriate airports, the specific facts about the customer's request to change the arrival airfield from Midway to Chicago O'Hare do not support a finding that Mr. Weil's resistance to that change constituted a protected activity. Again, Mr. Weil did not establish that the charter customer's requested change involved a violation of legal or regulatory aviation safety requirements. Further, as Mr. Barber subsequently documented, Planet Airways' response to Mr. Weil's concern about the airport change related to the office disruption he caused by his reaction to the request.

Having addressed three of the allegations in Mr. Weil's written AIR 21 complaint, I now must determine whether the fourth allegation relating to the implementation of the APIS transmission requirements satisfies the three components of a protected activity.

First, Mr. Weil's expressed concern about Planet Airways' compliance with the provisions of the Aviation and Transportation Security Act and related APIS transmission certainly "touched on" aviation safety. A principle purpose of the statute and the regulatory transmission requirements was the protection of air carriers and their passengers from potential terrorist acts.

At the same time, when Mr. Weil strongly urged APIS compliance to Mr. Garrambone and Mr. Hackert in the February 5, 2002 telephone conference and Mr. Weil registered complaints about Planet Airways' inaction to Mr. Garrambone over the next few days, implementation of the APIS transmission requirements was still pending. In other words, prior to the APIS transmission effective date of February 18, 2002, Planet Airways was legally incapable of violating the APIS regulations. From a purely technical point of view, Mr. Weil's complaint did not yet involve an actual violation of a Federal law or FAA regulation. Arguably, he was presenting nothing more than an anticipatory whistleblower complaint. However, considering the broad interpretation mandate, I conclude Mr. Weil's compliance advocacy and inactivity complaints constituted a protected activity because his actions related to an imminently impending FAA requirement. Mr. Weil started registering his APIS compliance less than two weeks before APIS transmissions were required; and, he continued to express his concerns, as long as Mr. Garrambone would listen, to within one week of the enactment date. Considering the extensive preparation apparently necessary to achieve APIS compliance and the temporal proximity of Mr. Weil's stated concerns to the implementation date of a significant aviation safety requirement, I find Mr. Weil's actions sufficiently related to a violation of an FAA regulation, standard, and order.

Concerning the reasonableness of his complaint, I conclude Mr. Weil had a reasonable concern that Planet Airways would not meet the APIS compliance deadline. Due to the swift

¹¹Mr. DeCamillis' testimony and Mr. Hackert's written statement, RX 19.

enactment of the Aviation and Transportation Security Act and associated regulations, Mr. Weil and Planet Airways were confronted with a new passenger information system and transmission requirement with a very short period of time to prepare for implementation. Partially recognizing airline operators' difficulties with the rapidly approaching transmission deadline, U.S. Customs officials presented to seminar participants in early February 2002 an existing software program that would facilitate compliance efforts. Mr. Weil's advocacy of that software solution was not unreasonable despite the \$10,000 software license considering that two APIS transmission violations could generate a combined penalty of \$10,000. Additionally, since Mr. Garrambone declined that option, indicated Planet Airways would find its own solution, and promised to send someone to the operations office, Mr. Weil's concerns about APIS compliance remained reasonable in light of the subsequent inactivity at the Fort Lauderdale base of operations.

The facts in Mr. Weil's case clearly establish the third component, communication of the protected activity. During the February 5, 2002 conference call, Mr. Weil strongly emphasized both the urgency and importance of meeting the February 18, 2002 deadline for APIS transmission to both his direct supervisor, Mr. Barber, and the company CEO, Mr. Garrambone. Over the course of the next week, Mr. Weil continued to present his compliance concerns to Mr. Garrambone.

In summary, Mr. Weil's advocacy of APIS compliance, and his expressed continuing concern that Planet Airways was not doing enough to ensure compliance, amounted to a protected activity under AIR 21. His actions related to noncompliance with an impending FAA requirement related to aviation safety, his concerns were reasonable under the circumstances, and he definitively presented his position on APIS compliance to his employer.

Unfavorable Personnel Action

Having engaged in a protected activity, Mr. Weil must next prove that he suffered an unfavorable personnel action. On February 15, 2002, Mr. Weil experienced the most significant unfavorable personnel action - Mr. Garrambone's termination of his employment with Planet Airways.

Issue No. 2 – Causation

To establish discrimination under AIR 21, Mr. Weil must also prove by a preponderance of the evidence a connection between his protected activity and the unfavorable personnel action. Initially, on the causation issue, Mr. Weil presents a strong circumstantial case. On February 5, 2002, Mr. Weil recommended to Mr. Garrambone adoption of existing software to meet the APIS requirements. When Mr. Garrambone declined that option, Mr. Weil challenged that decision before several other executives and again stressed the urgency and significance of APIS compliance. Mr. Garrambone still decided Planet Airways would take its own approach to meet the rapidly approaching compliance deadline. Over the course of the next few days, after Mr. Weil observed no apparent efforts to develop a system for APIS compliance, he again expressed his concerns directly to Mr. Garrambone on several occasions. Mr. Weil continued to urge action on compliance until he was no longer able to get his calls through to Mr. Garrambone.

Then, within ten days after first taking an adamant position on the best method to comply with APIS, and just a few days after Mr. Weil's last conversation with Mr. Garrambone about the APIS transmission requirement, Mr. Garrambone fired Mr. Weil.

Planet Airways has responded to Mr. Weil's circumstantial evidence with direct evidence consisting of a) credible testimony from two executives who participated in the termination decision process and b) Mr. Weil's personnel record while employed at Planet Airways. Additionally, other evidence in the record, both direct and circumstantial, places Mr. Weil's termination into a different perspective than the situation presented by Mr. Weil's circumstantial evidence. For the reasons set out below, I conclude this evidence has greater probative value and cumulatively outweighs and overwhelms Mr. Weil's circumstantial evidence.

Although Mr. Garrambone did not testify about his termination decision, both Mr. Rodriquez and Mr. DeCamillis, who were present during the termination discussion, provided sworn testimony. As I have previously determined, I found both Mr. Rodriquez and Mr. DeCamillis to be credible witnesses. Consequently, I believe their testimony that Mr. Weil's protected activities were not addressed during their conversation with Mr. Garrambone about terminating his employment. Instead, their discussion focused on Mr. Weil's uncooperative and argumentative attitude with a new employee and his repeated threats to leave the company and take items with him.

Notably, Mr. DeCamillis, one of two executives with the authority to terminate Mr. Weil, was really unaware of his protected activities. Serving principally as the company's chief financial officer, Mr. DeCamillis had little involvement with flight operations. Although he knew about APIS and its purpose, Mr. DeCamillis was not a participant in the February 5, 2002 telephone conference call with Mr. Garrambone and Mr. Weil. Likewise, he was not aware of the APIS portion of Mr. Hackert's letter, had no APIS conversations with Mr. Weil, and did not hear APIS mentioned during the termination discussion. In other words, Mr. Weil's protected actions played no role in Mr. DeCamillis' termination decision. Instead, aware of Mr. Weil's past personnel problems through Mr. Barber's previous complaints, Mr. DeCamillis found sufficient grounds to terminate Mr. Weil when presented with information about Mr. Weil's recent confrontation with the new international passenger service employee and his renewed threats of leaving the company. Additionally, I found no evidence to suggest that Mr. DeCamillis simply acquiesced to Mr. Hackert's termination recommendation and Mr. Garrambone's wishes. In fact, based on the persistent complaints he had personally received from Mr. Barber, Mr. DeCamillis had previously wondered why Mr. Barber kept Mr. Weil on board.

In a similar manner, although he must have been aware of APIS because it was mentioned by Mr. Hackert in his February 14, 2002 letter, Mr. Rodriquez wasn't aware of Mr. Weil's protected activity in regards to APIS when he brought the decision makers together to consider Mr. Hackert's termination recommendation. He did not participate in the February 5, 2002 conference call and was not privy to Mr. Weil's subsequent communications to Mr. Garrambone about compliance. Instead, Mr. Rodriquez was acting on Mr. Hackert's complaints of recent problems with Mr. Weil because the issues raised by Mr. Hackert were consistent with

the unfavorable impression Mr. Rodriguez developed in mid-November 2001 when Mr. Weil's unprofessional behavior caught his attention.

I have considered the possibility that Mr. Weil's APIS-related activities may still have been introduced into the termination decision process by Mr. Hackert's February 14, 2002 memorandum reference. Mr. Hackert was no fan of Mr. Weil and his APIS reference might represent an attempt to emphasize, at least to Mr. Garrambone, the potential problems associated with a continuation of Mr. Weil's protected activities. However, a fair reading of Mr. Hackert's APIS reference demonstrates that he was complaining that Mr. Weil waited too long to bring the upcoming APIS requirement to his attention.¹² He was not complaining about Mr. Weil's subsequent advocacy for APIS compliance. In other words, as presented in the memorandum, the subject of Mr. Hackert's complaint relates to the timing of Mr. Weil's February 5, 2002 presentation about APIS in the telephone conference, not its substance. Essentially, Mr. Hackert believes Mr. Weil was derelict in his duties by failing to inform him of the APIS requirements when they were made known in December 2001. Consequently, I conclude Mr. Hackert's concern about Mr. Weil's inaction on APIS and his memorandum APIS reference did not interject Mr. Weil's protected activities into the termination decision process.

In addition to the probative testimony from Mr. DeCamillis and Mr. Rodriguez that Mr. Weil's protected activity was not a contributing factor in his termination, Planet Airways presented Mr. Weil's personnel record. As documented in his personnel record, Mr. Weil's persistent failure to comply with Planet Airways' standards on professional communication, coupled with previous warnings and a one week suspension, further diminishes the probative value of his circumstantial case of adverse discrimination.

Understandably, Mr. Weil challenges the representation that his discharge was based on inadequate job performance rather than his protected activities. In an attempt to make that point, he called his former supervisor, Mr. Barber, to prove that he was a very good Director of Passenger Services. Yet, Mr. Barber presented a mixed assessment of Mr. Weil's performance. According to Mr. Barber, Mr. Weil was a very productive, valuable, and highly reliable worker who was "extremely knowledgeable" in the passenger services business and had an extensive network of contacts. He understood why Mr. Weil was frustrated by the many customer complaints generated by Mr. Hackert's lack of understanding about Planet Airways' operational capabilities. He believed many of the issues raised by Mr. Hackert were unfair and disagreed with Mr. Garrambone's opinion that Mr. Weil was just being argumentative. Mr. Barber felt so strongly about Mr. Weil's worth that he negotiated with Mr. Garrambone a one week suspension

¹²Mr. Hackert's expressed irritation with Mr. Weil on APIS is objectively misplaced. In November 2001, public announcements about enactment of the Airline and Transportation Security Act and its APIS element were made. At that time, attentive corporate executives in the airline industry had ample notice that some type of passenger reporting requirement was looming in the near future. More significantly, Planet Airways' Director of Safety, Mr. Bainton, was informed about the APIS program in December 2001. Any responsibility for late notification to Mr. Hackert belongs to Mr. Bainton, who was well positioned to inform other company executives. Additionally, prior to the February 2002 seminar, Mr. Weil didn't know the APIS implementation details. As soon as Mr. Weil obtained specific information about APIS from the early February 2002 U.S. Customs seminar, he immediately presented the requirements to Mr. Bainton, Mr. Barber and shortly thereafter, Mr. Garrambone and Mr. Hackert.

rather than a termination action in October 2001. Substantively, in Mr. Barber's opinion, Mr. Weil was a solid worker.

On the other hand, in terms of Mr. Weil's process, Mr. Barber's evaluation was less supportive. Mr. Barber observed that Mr. Weil did not react very well to changes and would become disgusted and exasperated. More significantly, Mr. Barber recognized that Mr. Weil's temper lead to multiple incidents of yelling and arguing. Mr. Weil was repeatedly argumentative with co-workers, particularly Mr. Hackert. While understanding Mr. Weil's frustrations in the arrangements made by Mr. Hackert, on October 11 and 18, 2001, Mr. Barber nevertheless counseled Mr. Weil about being rude and obnoxious to customers and argumentative with co-workers, both breaches of established company policy (*see* RX 1). When he suspended Mr. Weil for the last week in October 2001, Mr. Barber was able to give him one last chance to address these performance deficiencies. Mr. Barber specifically warned Mr. Weil that any further incidents of unprofessional communication or verbal threats of resignation would lead to "immediate" termination.

Despite this significant "last" warning, Mr. Weil lost control again in mid-November creating a loud altercation with the vice president of maintenance in the Planet Airways' offices. Even though his anger may have been justified, Mr. Barber once again had to tell Mr. Weil that his choice of behavior was unacceptable. Then, less than four months after his suspension, Mr. Weil was again a) demonstrating argumentative behavior towards Ms. Scott, a new employee, and b) as Mr. Weil acknowledged, when he encountered difficulty with Mr. Hackert in February 2002, Mr. Weil threatened to resign.

Rather than demonstrate that Planet Airways' reliance on Mr. Weil's personnel record was pre-textual, Mr. Barber's testimony provides additional insight into the problems he and Planet Airways had in getting Mr. Weil to comply with company behavior standards. That is, Mr. Barber's testimony, at best, establishes Mr. Weil was only partially successful as a Director of Passenger Services. While his productivity may have outweighed personal communication shortfalls in Mr. Barber's mind, Mr. Weil had ample notice with the one week suspension that even Mr. Barber's patience was thinning. Of greater significance, at the time of the suspension, Mr. Barber also told Mr. Weil that Mr. Garrambone was ready to fire Mr. Weil at that time. Apparently, Mr. Garrambone had a different opinion on whether Mr. Weil's expertise outweighed his communication deficiencies.

Regardless of the underlying provocations and the legitimacy of his feelings, by the end of October 2001, as established by his personnel record well before any of involvement with APIS, Mr. Weil had received ample warning and notice that his deficiencies in attitude towards co-workers and his verbal threats of resignation would no longer be tolerated. When between the end of October 2001 and February 14, 2002, Mr. Weil was involved in further incidents that reflected his failure to correct the more than sufficiently identified performance deficiencies,¹³

¹³The value of Mr. Barber's testimony that he did not receive any complaints about Mr. Weil after the October 2001 suspension has diminished probative value for two reasons. First, his statement obviously omits his own counseling of Mr. Weil in mid-November 2001 for his loss of control. Second, by late fall of 2001 and into the spring of 2002, Planet Airways executives were planning to remove Mr. Barber. As a result, he was being isolated and not made aware of other performance concerns related to Mr. Weil.

Planet Airways acted on its previous warnings to Mr. Weil and terminated his employment. The preponderance of the probative evidence from Mr. Weil's personnel record demonstrates that his failure to change his unsatisfactory behavior after the October 2001 one week suspension caused his February 15, 2002 discharge.

Stepping back from the specifics of Mr. Weil's termination and taking a broader view of the personnel dynamics at Planet Airways during this time frame provides additional evidence that Mr. Weil's separation was unrelated to his protected activities.

On the morning Mr. Weil was terminated, his supervisor, Mr. Barber, also lost his job. The separation of Mr. Weil and Mr. Barber on the same day was not just a serendipitous event or matter of convenience. As discussed above, Mr. Barber had conflicting views about Mr. Weil's performance: strong in the business of passenger services, weak in the process of dealing with customers and co-workers. When Mr. Garrambone had reached his limit with Mr. Weil in October 2001, only Mr. Barber's negotiations saved Mr. Weil's job. In other words, if Mr. Barber had not intervened, Mr. Weil would have been unemployed at the end of October 2001, well before enactment of the Airline and Transportation Security Act and the requirements associated with APIS. Mr. Barber was able to get Mr. Weil one more chance. However, by February 2002, Mr. Weil's inadequate interpersonal skills put him back on the unemployment precipice. This time, Mr. Barber was in no position to save him. Mr. Barber's departure, coupled with Mr. Weil's continued performance issues, gave Mr. Garrambone an opportunity to effectuate an action he had wanted to take in October 2001.

In mid-November 2001, when Mr. Weil lost control, the adverse effect of his poor behavior was compounded by the fact that the company's new human resource manager, Mr. Rodriquez, had to intervene and stop Mr. Weil's yelling. Surprised by Mr. Weil's unprofessional behavior, Mr. Rodriquez reviewed Mr. Weil's personnel record, noted the previous one week suspension, and concluded Mr. Barber should have separated Mr. Weil at that time. Subsequently, when Mr. Weil's behavior problems resurfaced, Mr. Rodriquez played no small role in Mr. Weil's separation.

Finally, by the fall of 2001, Planet Airways appears to have become concerned about ground handling costs and Mr. Weil's means and methods of managing those expenses. One of the deficiencies Mr. Barber noted in his October 2001 suspension notice was Mr. Weil's failure to develop a ground handling cost database, as directed (emphasis added). Mr. Hackert believed Mr. Weil's reliance on one vendor for international arrangements produced high costs. Eventually, in the late fall of 2001, Mr. Hackert hired a consultant, Ms. Scott, to evaluate the international ground handling charges. That situation caused friction between Mr. Weil and both Mr. Hackert and the consultant. When Mr. Hackert then hired Ms. Scott in February 2002 as the Director of International Passenger Services, the stage was set for greater friction. Mr. Weil returned to his uncooperative, confrontation style and denied them access to information related to Planet Airways' ground handling costs. Mr. Weil's belief that Ms. Scott had been brought in by Mr. Hackert to replace him was not necessarily unreasonable. However, his behavioral response of confronting Ms. Scott and Mr. Hackert in the second week of February 2002 further supports the finding that Planet Airways ended its employment relationship with Mr. Weil.

because he failed to correct a previously identified deficiency in his attitude toward other employees.

CONCLUSION

The preponderance of the more probative evidence establishes that Mr. Weil's protected activity of advocating and raising concerns about compliance with APIS transmission requirements in February 2002 did not contribute to his employment termination. Instead, in light of previous warnings and a one week suspension, and due to his continued unprofessional behavior towards Planet Airways' employees and renewed resignation threats, Mr. Garrambone and Mr. DeCamillis terminated his employment on February 15, 2002. Accordingly, Mr. Weil has failed to carry his evidentiary burden of proof and his AIR 21 discrimination complaint must be dismissed.¹⁴

DER

The discrimination complaint of MR. PATRICK L. WEIL against PLANET AIRWAYS, INC., brought under the employee protection provisions of AIR 21 is **DISMISSED**.

SO ORDERED:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: March 15, 2004
Washington, D.C.

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the

¹⁴Since Mr. Weil failed to establish that his protected activity was a contributing factor to his discharge, I need not address the third issue of Planet Airways' affirmative defense.

Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21,